Fordham Law Review

Volume 82 | Issue 1 Article 5

2013

No Defense for Self-Defense: Determining Whether Courts Should Order Insurers To Represent Insureds Who Have Acted in Self-Defense

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NO DEFENSE FOR SELF-DEFENSE: DETERMINING WHETHER COURTS SHOULD ORDER INSURERS TO REPRESENT INSUREDS WHO HAVE ACTED IN SELF-DEFENSE

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The right to defend oneself has traditionally been heavily protected by courts in all scenarios. However, the refuge that an act of self-defense provides becomes muddled in the context of an insurance agreement. State courts are split on whether an insured who claims to have acted in self-defense is entitled to legal representation and compensation from the insurer in light of an insurance contract containing an intentional injury exclusion clause. This clause is used virtually uniformly throughout the insurance industry and it has caused courts to ponder if an act of self-defense fits within the language of such a clause, and, consequently, if an act of self-defense should be excluded from insurance coverage. This Note analyzes both the textual and public policy arguments that are set forth by the proponents of each side of this dispute as well as the lines of reasoning courts use in justifying their divergent rulings. Taking this analysis into consideration, this Note ultimately concludes that acts of self-defense should be excluded from coverage when traditional policy terms are used.

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INTRODUCTION

You are attacked in your own home. You fight back. You have done nothing wrong, yet your insurance company asserts that it is not legally obligated to cover your damages or represent you. This might not seem fair, but what if you previously agreed to let the insurance company off the hook? This situation is created by intentional injury exclusion clauses that are found in personal liability insurance contracts.

An intentional injury exclusion clause prevents the insured from recovering damages that he caused on purpose.[1] Many would agree that acts of self-defense fit within this definition based solely on a literal

1. *See* 10 COUCH ON INSURANCE § 140:64 (Lee R. Russ & Thomas F. Segalla eds., 3d rev. ed. 2011).

reading.[2] On the other hand, many would also agree that appropriate force used in self-defense should be a heavily protected right.[3] Then again, a contract is no more than what its terms state, and a basic precept of contract law is to allow individuals the freedom to contract as they see fit.[4] As evidenced by this back and forth, courts that encounter this type of suit face a difficult decision, and their decisions have been anything but consistent.[5]

Part I of this Note gives a background on the insurance industry, specifically personal liability insurance. This overview begins with a look at the basic structure of insurance policies and some key provisions that are common to most policies. This Part next provides an analysis of adhesion contracts and how insurance policies fit into that analysis. A summary of some important rules of construction and the competing principles of self-defense and freedom of contract concludes Part I.

Part II provides a breakdown of how different courts have interpreted intentional injury exclusion clauses in the context of self-defense and the arguments advanced on behalf of both the insurer and insured. Part II first examines the competing assertions that can be made from a textual analysis of this exclusion clause. This discussion focuses on how courts and commentators have interpreted the terms "intended" and "expected" as used in exclusion clauses. Part II concludes by analyzing the opposing sides' views regarding public policy concerns relating to this issue.

Lastly, Part III asserts that courts should rule that acts of self-defense are excluded from coverage where there is an intentional injury exclusion clause. Part III reaches this conclusion through a plain reading of the text, by considering public policy arguments, and by determining the most pragmatic approach.

I. BETTER SAFE THAN SORRY: AN OVERVIEW OF INSURANCE POLICIES AND THE FACTORS THAT AFFECT COURTS' INTERPRETATIONS OF THEM

While most people in the United States have some form of insurance,[6] often times insured individuals will not bother to read or understand the terms of their insurance contracts.[7] In light of this, this section begins with an overview of how liability insurance works and the common provisions

2. *See, e.g.*, Weight v. USAA Cas. Ins. Co., 782 F. Supp. 2d 1114, 1128 (D. Haw. 2011); State Farm Fire & Cas. Co. v. Marshall, 554 So. 2d 504 (Fla. 1997). *But see* Walters v. Am. Ins. Co., 8 Cal. Rptr. 665 (Ct. App. 1960) (holding that an element of wrongfulness or misconduct is connoted within exclusion clauses and finding that self-defense falls outside of the literal meaning of the terms).

3. *See* McDonald v. City of Chi., 130 S. Ct. 3020, 3023 (2010); Scribner v. Beach, 4 Denio 448, 450 (N.Y. Sup. Ct. 1847).

4. *See* Smiley v. Kansas, 196 U.S. 447, 456 (1905).

5. *See infra* Part II.

6. *Health Insurance*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/www/hlthins/data/incpovhlth/2011/highlights.html (last visited Sept. 20, 2013) (indicating that in 2011, 84.3 percent of Americans had some form of health insurance).

7. Spychalski v. MFA Life Ins. Co., 620 S.W.2d 388, 392 (Mo. Ct. App. 1981) (referencing life insurance policies); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981) (suggesting that the insurance industry does not expect the contracts to be read).

that can be found in such policies (specifically, the intentional injury exclusion clause). Next, this Note discusses the insurance contract in the context of adhesion contracts. A short description of the pertinent rules of construction that are commonly used for insurance contracts follows. This section ends with an analysis of the competing principles of self-defense and freedom of contract as they relate to intentional injury exclusion clauses.

A. Liability Insurance Basics

Insurance is a contractual security against anticipated loss where the risk of loss is occasioned by some future event and is shifted to the insurer.[8] The insurer accounts for this risk through the receipt of a premium paid by the insured that is placed into a general fund.[9] This Note focuses on liability insurance, one type of insurance where intentional injury exclusion clauses are commonly found.[10]

1. Policy Fundamentals

Liability insurance covers an insured's liability to others for injuries or property damage for which the insured is legally responsible.[11] Furthermore, liability policies specify that the insurer has a duty to defend the insured against third party claims.[12] A liability insurance policy only provides coverage for those hazards that are expressly covered by the terms of the policy.[13] To remain covered under an insurance policy, the insured must make timely premium payments as specified under the terms of the agreement.[14] The premium constitutes the insured's consideration for the contract and, as a general rule, it must be paid prior to the time period intended to be covered.[15]

Although insurers offer many different types of liability insurance policies,[16] intentional injury exclusion clauses are most prevalent in

8. 1 COUCH ON INSURANCE, *supra* note 1, § 1.6.

9. *Id.*

10. *See* 1 NEW APPLEMAN LAW OF LIABILITY INSURANCE § 1.09 (Matthew Bender ed., rev. ed. 2012) [hereinafter APPLEMAN] (explaining that courts will seek to determine if the results of the insured's conduct were intended or expected under a standard comprehensive general liability policy).

11. Lou-Con, Inc. v. Gulf Bldg. Servs., Inc., 287 So. 2d 192, 206 (La. Ct. App. 1973); Ryan Homes, Inc. v. Home Indem. Co., 647 A.2d 939, 942 (Pa. Super. Ct. 1994).

12. 1 APPLEMAN, *supra* note 10, § 1.01.

13. Mem'l Props. v. Zurich Am. Ins. Co., 46 A.3d 525, 532 (N.J. 2012) ("Courts cannot 'write for the insured a better policy of insurance than the one purchased.'" (quoting Flomerfelt v. Cardiello, 997 A.2d 991, 996 (N.J. 2010))); *see also* Westfield Ins. Co. v. Porchervina, No. 2008-L-025, 2008 Ohio App. LEXIS 5466, at *7–10 (Ct. App. Dec. 12, 2008) (holding that emotional distress injuries are not covered under the policy definition of "bodily injury").

14. Brooks v. La. Citizens Fair Plan, 4 So. 3d 899, 903–04 (La. Ct. App. 2009).

15. 1 APPLEMAN, *supra* note 10, § 2.05.

16. Some of the more common liability insurance policies include: comprehensive general liability, directors and officers liability, homeowners/renters liability, professional liability, automobile liability, and aviation liability. *Id.* § 1.01.

comprehensive general liability (CGL) insurance and homeowners insurance.[17] CGL policies encompass the standard types of coverage of liability risk arising out of the operations of a business.[18] In this sense, CGL policies are essentially the business equivalent of homeowners insurance.[19] Both of these policies generally cover the insured's liabilities for bodily injury or property damage caused to others.[20] While coverage is typically limited to damage occurring on the insured's property, policy coverage may be extended in certain cases.[21]

Liability insurance policies are not necessarily uniform for every customer that seeks a specific type of insurance.[22] Individual negotiations, applicable state regulations, and evolving judicial rulings all serve to differentiate insurance policies developed by the same insurer.[23] Nevertheless, the insurance industry has made the concept of standardized[24] forms a key component to its success.[25] This has resulted in many commonalities that can be seen in all liability insurance policies, especially in terms of the structure of policies.[26]

A liability contract will generally consist of five parts: (1) the declarations page, (2) the insurance agreement, (3) exclusion provisions, (4) customized riders, and (5) conditions for coverage.[27] The declarations page is a summary of the policy that contains all of the essential terms stated in an abbreviated form.[28] Although it is viewed as a summary, the declarations page and its provisions are part of the policy, and its language is binding.[29] The insurance agreement, often referred to as "the policy,"

17. *Id.* §§ 1.03, 1.09; ALLSTATE INS. CO., ALLSTATE INSURANCE COMPANY STANDARD SELECT VALUE HOMEOWNERS INSURANCE POLICY 16, *available at* http://insurance.mo.gov/consumers/home/documents/AP148.pdf (last visited Sept. 20, 2013).

18. 1 APPLEMAN, *supra* note 10, § 1.03.

19. *See id.* (noting that in addition to bodily injury and property damages, CGL policies also cover personal and advertising injury).

20. *Id.*

21. *See, e.g.*, Herring v. Horace Mann Ins. Co., 795 So. 2d 209 (Fla. Dist. Ct. App. 2001) (holding that liability arising out of the insured's use of a golf cart at an off-premises golf course will generally be covered under the insured's homeowners policy).

22. 1 APPLEMAN, *supra* note 10, § 1.01.

23. *Id.*

24. Oftentimes, insurance companies will use standardized policies developed by the Insurance Services Office, Inc. (ISO). The ISO is a nonprofit organization, to which most insurance companies belong, that submits these standardized forms to insurance regulators of different states for approval. Other insurers may use forms developed by the American Association of Insurance Services or develop their own forms. 2 APPLEMAN, *supra* note 10, § 13.02.

25. *See infra* Part I.B.3.

26. *See* 1 APPLEMAN, *supra* note 10, § 1.01.

27. *Id.* § 1.02.

28. Todd v. Mo. United Sch. Ins. Council, 223 S.W.3d 156, 160 (Mo. 2007).

29. *See* Renz v. Allstate Ins. Co., 763 A.2d 1072, 1074–75 (Conn. App. Ct. 2001). Where the declarations page is in conflict with other provisions within the policy, the provision is deemed to be ambiguous and the proper rules of construction should be applied to resolve this ambiguity. *See* Scottsdale Ins. Co. v. Nat'l Sec. Fire & Cas. Ins. Co., 741 So. 2d 424, 426–27 (Ala. Civ. App. 1999); Williams v. Farmers Ins. Co., 212 P.3d 403, 406 (N.M. Ct. App. 2009).

spells out the rights and obligations of both parties.[30] Most policies also contain exclusion provisions, such as an intentional injury exclusion clause, which serve to narrow the liability of the insurer in circumstances where the insured would normally be covered under the insurance agreement.[31] An insurance policy may also contain customized riders that are attached to the standardized policies.[32] Riders contain negotiated provisions between the insurer and an individual insured that modify the general terms of the policy.[33] Lastly, the conditions section explains additional duties for the insured, including timely notice of a claim and full cooperation with any insurer investigation.[34]

2. Insurer Duties

In addition to a standard structure of policies, the obligations of insurers are also fairly uniform throughout the insurance industry because of standard provisions and case law.[35] The two most essential obligations of an insurer are the duties to indemnify and to defend.[36] The duty to indemnify is straightforward.[37] The insurer must compensate the insured if the damages incurred by the insured are covered by the policy.[38] The duty to defend is much broader and is completely separate from the duty to indemnify.[39]

To satisfy the duty to defend, an insurer must retain counsel for the insured and direct the defense of the suit against the insured.[40] If a conflict of interest arises, the insurer may be ordered to provide for independent counsel.[41] An insurer's duty to defend begins when the insured files a claim that may potentially fall within the individual's policy.[42] "[I]f the injured party states a claim, which, qua claim, is for an injury 'covered' by the policy . . . it is irrelevant that the insurer may get information . . . which indicates . . . that the injury is not in fact 'covered.'"[43] The insurer must continue to defend the insured "until all possible theories of recovery which could be covered by the policy are eliminated."[44]

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30. 1 APPLEMAN, *supra* note 10, § 3.03.
31. *Id.*; *see also* ALLSTATE INS. CO., *supra* note 17, at 16.
32. *See* Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co., 530 F.3d 395, 400 (5th Cir. 2008).
33. *See id.*
34. 1 APPLEMAN, *supra* note 10, § 3.03.
35. *See* QBE Ins. Corp. v. Brown & Mitchell, Inc., 607 F. Supp. 2d 762, 767 (S.D. Miss. 2008); 1 APPLEMAN, *supra* note 10, § 1.05.
36. *See* 1 APPLEMAN, *supra* note 10, § 1.05.
37. *See id.*
38. *See id.*
39. *See* Safeco Ins. Co. of Am. v. Fireman's Fund Ins. Co., 55 Cal. Rptr. 3d 844, 850–51 (Ct. App. 2007).
40. 1 APPLEMAN, *supra* note 10, § 1.05.
41. *See* 14 COUCH ON INSURANCE, *supra* note 1, § 202:20.
42. *See* 1 APPLEMAN, *supra* note 10, § 1.05.
43. Lee v. Aetna Cas. & Sur. Co., 178 F.2d 750, 751 (2d Cir. 1949) (applying New York law).
44. Northland Ins. Co. v. Stewart Title Guar. Co., 327 F.3d 448, 457 (6th Cir. 2003) (applying Michigan law); *see also* Farmers & Mechs. Mut. Ins. Co. of W. Va. v. Cook, 557

Of course, the insurer may seek to have the court determine as a matter of law that the insured is not entitled to the duty to defend.[45] This can be accomplished through a motion for summary judgment.[46] An insurer's duty to defend has traditionally been determined solely on a reading of the complaint against the insured and the insurance policy.[47] This is known as the "eight corners" rule.[48] If the allegations of the complaint lead the court to believe that the offenses would fall within the terms of the insurance policy, the insurer will be required to honor his duty to defend.[49]

Perhaps in an attempt to expand this bright-line rule, insurers have trended towards conducting their own investigations relating to their duty to defend on individual claims.[50] This has encouraged some jurisdictions to shy away from strictly adhering to the eight corners rule in favor of allowing external evidence (most likely discovered by the insurer) to be admitted.[51] However, this expansion of permissible evidence can also serve to protect the insured.[52] In many jurisdictions, if the insurer has uncovered facts illustrating that the insured is entitled to policy coverage, the insurer must uphold its duty to defend even if the complaint's allegations do not sufficiently support such a conclusion.[53]

3. Intentional Injury Exclusion Clauses

Determining the insurer's obligations does not end the inquiry. The essential question in a coverage dispute is, under what circumstances must the insurer honor its duties? Personal liability insurance typically provides coverage on an "occurrence" basis.[54] An occurrence is defined as an accident which results in bodily injury or property damage neither intended nor expected from the insured's standpoint.[55] Courts have defined the term accident as an event that is "unexpected, unusual, and unforeseen."[56]

S.E.2d 801, 806 (W. Va. 2001) (noting that the insurer may be obligated to defend suits that are "'groundless, false or fraudulent'" (quoting Aetna Cas. & Sur. Co. v. Pitrolo, 342 S.E.2d 156, 160 (1986))).

45. *See* West v. Bd. of Comm'rs, 591 So. 2d 1358, 1360 (La. Ct. App. 1991).

46. *See, e.g.*, *id.*

47. *See* Nat'l Cas. Co. v. Vigilant Ins. Co., 466 F. Supp. 2d 533, 538 (S.D.N.Y. 2006); Cluett v. Med. Protective Co. 829 S.W.2d 822, 829 (Tex. App. 1992).

48. *Cluett*, 829 S.W.2d at 829. This rule is referred to as the eight corners rule because the court examines the four corners of the complaint in conjunction with the four corners of the insurance policy. Essex Ins. Co. v. Café Dupont, LLC, 674 F. Supp. 2d 166, 169–71 (D.D.C. 2009).

49. *See, e.g.*, Truck Ins. Exch. v. Vanport Homes, Inc., 58 P.3d 276, 282 (Wash. 2002) (en banc).

50. 14 COUCH ON INSURANCE, *supra* note 1, § 200:17.

51. *See, e.g.*, Safeco Ins. Co. of Am. v. Fireman's Fund Ins. Co., 55 Cal. Rptr. 3d 844, 850 (Ct. App. 2007); Cunningham v. Universal Underwriters, 120 Cal. Rptr. 2d 162, 167 (Ct. App. 2002); Peterson v. Ohio Cas. Grp., 724 N.W.2d 765, 774 (Neb. 2006).

52. 2 APPLEMAN, *supra* note 10, § 6.02.

53. *Id.*

54. *See* 9 COUCH ON INSURANCE, *supra* note 1, § 126:29.

55. *See id.*

56. Corder v. William W. Smith Excavating Co., 556 S.E.2d 77, 82 n.12 (W. Va. 2001); *see also* Mass. Bay Ins. Co. v. Vic Koenig Leasing, Inc., 136 F.3d 1116, 1124 (7th Cir.

Assuming that there has been an occurrence, the insured will be covered if the damage has taken place in the coverage territory, it occurs during the policy period, and the insured did not know of the damage prior to the policy period.[57]

Nevertheless, even if the insured conforms to these requirements, his actions may fall under an exclusion provision.[58] This would prevent the insured from being covered by the policy.[59] This Note focuses on the intentional injury exclusion.

An intentional injury exclusion clause is designed to deny insurance coverage to those who cause damage on purpose.[60] If the insured can control the risk of damage, the central concept of insurance is violated.[61] Compensating the insured for intentional acts incentivizes him to destroy property where the value of the insurance is greater than the property's actual value.[62] Furthermore, the insured could do harm to others with few financial repercussions.[63] As a result, even where there is no explicit exclusion clause within the contract, courts may still impose this exclusionary provision as a matter of public policy.[64]

B. Adhesion Contracts

Courts' interpretations of insurance contract provisions are often heavily influenced by the idea that insurance contracts are contracts of adhesion.[65] Therefore, this section presents an in-depth discussion on adhesion contracts. This section defines adhesion contracts and looks at some of the harmful consequences of using them. It then discusses these features in the context of insurance contracts.

1. Definition and Features of Adhesion Contracts

An adhesion contract is traditionally defined by the following seven characteristics:

> (1) The document whose legal validity is at issue is a printed form that contains many terms and clearly purports to be a contract.

1998) (applying Tennessee law); State Bancorp, Inc. v. U.S. Fid. & Guar. Ins. Co., 483 S.E.2d 228, 234 (W. Va. 1997).

57. 1 APPLEMAN, *supra* note 10, § 1.07.

58. *Id.* § 3.03.

59. *Id.*

60. *See* Woida v. N. Star Mut. Ins. Co., 306 N.W.2d 570, 572–73 (Minn. 1981) (en banc). Acting intentionally to create a risk conflicts with the universal insurance principle known as the "fortuity doctrine," which states that an act must be fortuitous to be subject to insurance coverage. Two Pesos, Inc. v. Gulf Ins. Co., 901 S.W.2d 495, 501 (Tex. App. 1995) (explaining that any event that is a certainty is not fortuitous and, therefore, to allow a person to insure against the occurrence of such an event would be patently unfair to the insurer).

61. Aetna Cas. & Sur. Co. v. Freyer, 411 N.E.2d 1157, 1159 (Ill. App. Ct. 1980).

62. *See* Med. Soc'y of N.Y. v. Serio, 800 N.E.2d 728, 731–32 (N.Y. 2003) (explaining that a common type of insurance fraud is to purchase insurance on a wrecked or salvaged vehicle, get into an accident, and collect for feigned damages).

63. *See id.*

64. *See* Isenhart v. Gen. Cas. Co. of Am., 377 P.2d 26, 27–28 (Or. 1962).

65. *See infra* Part II.B.2.

> (2) The form has been drafted by, or on behalf of, one party to the transaction.
>
> (3) The drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine.
>
> (4) The form is presented to the adhering party with the representation that, except perhaps for a few identified items (such as the price term), the drafting party will enter into the transaction only on the terms contained in the document. This representation may be explicit or may be implicit in the situation, but it is understood by the adherent.
>
> (5) After the parties have dickered over whatever terms are open to bargaining, the document is signed by the adherent.
>
> (6) The adhering party enters into few transactions of the type represented by the form—few, at least, in comparison with the drafting party.
>
> (7) The principal obligation of the adhering party in the transaction considered as a whole is the payment of money.[66]

Scholars fear that the adhering party in these contracts usually does not read some, or all, of the terms.[67] Whether it is because the terms of the contract are too detailed and complicated for the ordinary consumer to understand,[68] or that the manner in which the contract is presented does not permit the consumer time to understand the terms,[69] there is a fear that consumers do not know what they are getting themselves into.[70] In fact, empirical studies have shown that consumers commonly do not read standardized adhesion contracts.[71] Furthermore, courts and legal scholars agree that those who make regular use of these contracts have come to expect that customers will not read them.[72]

A basic tenet of contract theory is that when a person signs a contract, that individual is assenting to the entire agreement.[73] This principle has been carried over into the area of adhesion contracts despite the evidence that consumers often do not explicitly assent to the entire agreement.[74]

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66. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983).

67. *See id.* at 1179; William M. Lashner, Note, *A Common Law Alternative to the Doctrine of Reasonable Expectations in the Construction of Insurance Contracts*, 57 N.Y.U. L. REV. 1175, 1176 (1982).

68. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981).

69. W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 540 (1971) (explaining that purchasers of insurance often do not receive the details of their policies until after they have entered into an agreement to purchase the insurance).

70. *See* Lashner, *supra* note 67, at 1176.

71. *See* Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 59 (1963); William C. Whitford, *Strict Products Liability and the Automobile Industry: Much Ado About Nothing*, 1968 WIS. L. REV. 83, 143–53.

72. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b; Rakoff, *supra* note 66, at 1179 n.23.

73. *See* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 630 & n.3 (1943).

74. *See* Rakoff, *supra* note 66, at 1176, 1185; Lashner, *supra* note 67, at 1176.

Under traditional theory, as long as the adherent had an opportunity to read the contract, all the terms of the contract will be enforceable against him, with few exceptions.[75] However, courts have backed off how much they are willing to hold adherents accountable for what they sign in response to this contradiction between theory and reality.[76]

The other major feature of adhesion contracts that scholars are wary of is the lack of choice that is given to the consumer.[77] However, the phrase "lack of choice" should not be taken in a literal sense.[78] In a competitive market, a consumer will typically be able to shop around for a different set of contractual terms within standardized agreements.[79] Nevertheless, "[w]hen avoiding the undesired consequences seems of such overriding importance as to drive from the mind of the chooser all other considerations, we sometimes speak of his choice as being eliminated."[80] This perception of lack of choice is more likely to occur when an industry is built upon the use of standard form contracts.[81] Realizing that he is the weaker party, the consumer is left unable to bargain for better terms.[82]

2. Insurance Contracts As Contracts of Adhesion

Insurance contracts have traditionally embodied the telltale characteristics of adhesion contracts,[83] and they are generally accepted as such.[84] In fact, courts often ignore or downplay evidence that individual insurance policies are not adhesion contracts.[85] Although classification as an adhesion contract by itself is not that important, the belief that insurance

75. Rakoff, *supra* note 66, at 1185 (noting that the adherent is usually only excused when he can prove that the drafting party affirmatively participated in creating the adherent's confusion).

76. *See infra* Part II.B.2.

77. *See* Slawson, *supra* note 69, at 549–50; Lashner, *supra* note 67, at 1176.

78. *See* Slawson, *supra* note 69, at 549–50 (describing lack of choice as an equivalent to coercion and acknowledging that there is usually always a literal choice that the adherent can make); Rakoff, *supra* note 66, at 1222 (referencing the back and forth between an appliance salesman and a consumer and noting that while there will be haggling over some terms, the consumer will ultimately concede to many provisions in the salesman's form contract).

79. Rakoff, *supra* note 66, at 1179 (observing that customers generally only shop around for contractual provisions that immediately impact them (cash or credit), are easily comparable (size of payment), or are traditionally differentiated within a particular industry (warranties on consumer products)).

80. Slawson, *supra* note 69, at 549.

81. *See id.* at 550.

82. *See id.* at 549–50; Lashner, *supra* note 67, at 1176.

83. *See* Rakoff, *supra* note 66, at 1177, 1269 (acknowledging that insurance contracts are illustrative of the seven characteristics that traditionally define contracts of adhesion).

84. *See id.*; *see also* James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation?: Text Versus Context*, 24 ARIZ. ST. L.J. 995, 1013 (1992); Lashner, *supra* note 67, at 1175, 1177 n.15 (noting that the term "contract of adhesion" was first introduced in an article that concentrated on insurance contracts); Harry F. Perlet, III, *The Insurance Contract and the Doctrine of Reasonable Expectation*, 6 FORUM 116, 117 (1970).

85. *See* Fischer, *supra* note 84, at 1013.

contracts frequently create a lack of choice and go unread by consumers has led some to criticize the insurance industry.[86]

One main reason asserted to support the argument that the insurance industry does not provide adequate choice to consumers is the disparity in bargaining power. This disparity is mainly a result of the insurance industry's structure and the lack of information provided to consumers.[87] Since the eighteenth century, the insurance industry has consisted of relatively few sophisticated insurers servicing a large general public that has little experience with contracting.[88] While the industry has grown, freedom of choice has not necessarily increased.[89]

In addition, the manner in which insurers engage with their customers plays a large role in disincentivizing the insured from carefully reading over the policy.[90] The most obvious issue with the process is that the insured often will agree to a contract and begin making premium payments before ever actually receiving the terms of the policy.[91] Some scholars argue that this industry custom hinders the insured's ability and motivation to understand the details of the policy.[92]

Furthermore, upon receiving a policy, many individuals may feel overwhelmed by the complexity of the agreement and deduce that they would not be able to understand the terms even if they did read it.[93] Scholars have claimed that the perceived incapability to bargain and lack of choice takes away any reason for the insured to read his contract.[94] As a result, the insured is often not aware of details within the policy that may limit his coverage, such as the exclusion clauses.[95]

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86. *See* Spychalski v. MFA Life Ins. Co., 620 S.W.2d 388, 392–93 & n.5 (Mo. Ct. App. 1981) (noting that an insured's assent to the policy terms is "resembled rather than actual"); Rakoff, *supra* note 66, at 1177, 1225–29; Slawson, *supra* note 69, at 539–41.

87. *See* Perlet, *supra* note 84, at 117; Susan Randall, *Freedom of Contract in Insurance*, 14 CONN. INS. L.J. 107, 124–25 (2008). *But see* Fischer, *supra* note 84, at 1017 (asserting that courts have failed to realize that a disparity in bargaining power may have no effect on the fairness of a contract).

88. *See* Perlet, *supra* note 84, at 117. In 2012, there were a total of 2,660 property/casualty insurance companies operating in the United States. *Industry Overview*, U.S. INS. INFO. INST., http://www.iii.org/facts_statistics/industry-overview.html (last visited Sept. 20, 2013). As of August 2013, there were 798 property/casualty insurers registered in New York State. *Insurance Company Search*, N.Y. ST. DEPARTMENT OF FIN. SERVICES, https://myportal.dfs.ny.gov/web/guest-applications/ins.-company-search (last visited Sept. 20, 2013) (search "Property/Casualty Insurers" under the "Org Type" drop down menu). However, many of these insurers belong to the same parent company. *See id.* For example, there are eight separate companies registered in New York that belong to the Allstate Insurance Group. *Id.*

89. *See* Randall, *supra* note 87, at 124–25.

90. *See* Lashner, *supra* note 67, at 1180–81.

91. *See id.* at 1180; *see also* Slawson, *supra* note 69, at 540.

92. *See* Lashner, *supra* note 67, at 1180; *see also* Slawson, *supra* note 69, at 540.

93. *See* Lashner, *supra* note 67, at 1180. Even business people and lawyers may find it too onerous to read through all of the complex legal terminology of an insurance contract. *See* Rakoff, *supra* note 66, at 1177, 1179 n.22.

94. *See* Lashner, *supra* note 67, at 1180; *see also* Slawson, *supra* note 69, at 549–53.

95. *See* Allstate Ins. Co. v. Reeves, 136 Cal. Rptr. 159, 161–63 (Ct. App. 1977) (noting that an exclusion clause was added to an insurance contract renewal without being called to the consumer's attention); Campione v. Lincoln Nat'l Life Ins. Co., 375 N.E.2d 129, 130–32

These issues are compounded by the difficulty that a consumer faces when he attempts to retrieve a copy of the policy, or any pertinent information regarding coverage, before actually purchasing insurance.[96] While many consumers rely on their insurance agents for guidance, insurance agents often do not have a particularized understanding of the more complicated terms within the different policies they sell.[97] Moreover, insurance agents' compensation incentives may not always align with the best interests of their clients.[98] Obtaining information from insurers' websites is also often hit or miss,[99] while television commercials are essentially void of all factual description.[100]

Finally, one would think that a state insurance regulator would be able to provide useful information, especially in light of the fact an insurer is required to file its policies with the state.[101] However, it is not uncommon to find that a state does not have complete and up-to-date policies to provide to consumers.[102]

3. Usefulness of Standardization in the Insurance Context

Based on the foregoing description, the term "contract of adhesion" has a tendency to conjure up images of a ruthless, all-powerful conglomerate forcing a nonnegotiable, standardized contract onto a helpless individual.[103] However, there is little doubt that a vast majority of contracts that are entered into are standard form contracts.[104] The reason for this phenomenon is that standardized contracts are useful to society in many ways.[105] In fact, standard contracts are essential to the existence of the insurance industry.[106]

For insurers to properly distribute risk amongst individuals that are similarly situated, the terms of each contract must be identical to each

(Ill. App. Ct. 1978) (acknowledging that the plaintiff was unaware of an exclusion clause that, if properly submitted to the state for approval, would have prevented his ability to recover).

96. *See* Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263, 1319–37 (2011).

97. *See id.* at 1328–32.

98. *Id.* at 1331.

99. *See id.* at 1332–34 (acknowledging that some insurer websites are useful in giving specific information while others use useless general statements to describe their coverage).

100. *See* Michelle Boardman, *Insuring Understanding: The Tested Language Defense*, 95 IOWA L. REV. 1075, 1093–98 (2010).

101. *See* Schwarcz, *supra* note 96, at 1322–23.

102. *See id.* at 1323–25 (noting that record maintenance rules often make it difficult for regulators to keep policies updated and intact).

103. *See* Conrad L. Squires, *A Skeptical Look at the Doctrine of Reasonable Expectation*, 6 FORUM 252, 252 (1970).

104. Slawson, *supra* note 69, at 529 (estimating that 99 percent of contracts made are standard form).

105. Squires, *supra* note 103, at 252; *see also* Kessler, *supra* note 73, at 631–32; Karl N. Llewellyn, *The Standardization of Commercial Contracts in English and Continental Law*, 52 HARV. L. REV. 700, 701–02 (1939).

106. *See* Squires, *supra* note 103, at 252–53.

other.[107] If the pool of insureds and their respective policy coverage provisions are not homogenous, an insurer is no longer issuing insurance; rather, the insurer is taking bets.[108] If an individual has coverage for an event that others do not have coverage for and are not paying premiums for, the insurer solely bears the risk of compensation should the event occur.[109]

Standardized contracts are also helpful in keeping insurance costs down.[110] This is accomplished in a couple of different ways. Standard forms most directly minimize cost by saving the time and effort that both parties would normally exert through bargaining.[111] When the parties are working with a familiar standard form, less time is needed to reach a finished product.[112] A less obvious way in which insurers save money through standard contracts is by minimizing the costs of litigation.[113] When drafting their standard policies, insurers are extremely particular with the language that is used to conform to the standards that have been laid out by the courts.[114] Furthermore, the fact that every provision is the same in every contract limits the possibility of courts or juries making unpredictable decisions.[115] As a result, insurers generally know how lawsuits against them will turn out and they can plan their legal expenses accordingly.[116] In the end, these savings are typically passed on to the consumer.[117]

In addition, some scholars have asserted that standardized contracts disregard human prejudices in a way that cannot be replicated through a bargaining process.[118] Risk distribution is accomplished through statistical probabilities and the premium that is charged is not based on one's ability to hire expensive lawyers that can bargain effectively.[119] Also, by maintaining a homogenous pool of risk for each contract type, no individual is receiving extra security.[120] In this sense, one can argue that insurance policy coverage is completely without prejudice.[121]

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107. *See id.*; *see also* Kessler, *supra* note 73, at 631; Lashner, *supra* note 67, at 1179.

108. *See* Squires, *supra* note 103, at 252.

109. *See id.* at 252–53.

110. *See* Kessler, *supra* note 73, at 632.

111. *See* Llewellyn, *supra* note 105, at 701. Any legal costs that come up during bargaining are also saved. Lashner, *supra* note 67, at 1179.

112. *See* Lashner, *supra* note 67, at 1179.

113. *See* Kessler, *supra* note 73, at 632.

114. *See* Fischer, *supra* note 84, at 995–96 (recognizing the insurance industry as the most prolific in incorporating judicial data into the formation of its contracts).

115. Kessler, *supra* note 73, at 631 (claiming that the insurance industry is the first to recognize the importance of controlling "irrational factors" that may sway a judge or the jury to rule against a powerful defendant).

116. *See id.*

117. *Id.* at 632.

118. *See* Lashner, *supra* note 67, at 1179; Squires, *supra* note 103, at 252–53.

119. *See* Lashner, *supra* note 67, at 1179.

120. *See* Squires, *supra* note 103, at 252–53 (explaining that the separation of different policies is for the policyholder's benefit in that a customer's premium dollars are always placed in a fund that is dedicated solely to cover the risks that are covered in her own policy).

121. *See id.*; Lashner, *supra* note 67, at 1179.

C. Rules of Construction

While the benefits and detriments of standardized insurance contracts factor into the public policy discussion, courts will often interpret an insurance policy based on a textual analysis.[122] For the most part, the interpretation of intentional injury exclusion clauses turns on how courts implement different rules of construction.[123] Consequently, this section gives an overview of those rules that are most relevant to the interpreting intentional injury exclusion clauses. This section summarizes the relevant rules of interpretation that are common to all contracts as well as those that are specific to insurance policies.

1. Rules Common to Contract Law

Some legal scholars have commented that the rules of insurance contract interpretation have evolved to become completely different from traditional contract theory.[124] However, a few fundamental principles that can be applied to all contracts are also vital to insurance policies.[125] One such principle is that an unambiguous contract provision will be enforced as written.[126] A court may not rewrite a contract to provide additional coverage to the insured that is not provided for within the terms of the coverage.[127] After all, when an individual signs a contract, that person is assenting to all the terms of the agreement as written.[128]

Based on similar reasoning, another relevant tenet is that courts are extremely hesitant to make contractual changes based on public policy.[129] This is true even of contracts of adhesion.[130] Only where a contract is unquestionably against public morals or welfare may a court act as a voice of the public.[131]

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122. *See infra* Part II.A.

123. *See id.*

124. Fischer, *supra* note 84, at 997 & n.7.

125. *Id.* at 1001–08.

126. Mem'l Props. v. Zurich Am. Ins. Co., 46 A.3d 525, 532 (N.J. 2012) ("The terms of insurance contracts are given their 'plain and ordinary meaning.'" (quoting Flomerfelt v. Cardiello, 997 A.2d 991, 996 (N.J. 2010))).

127. *See id.* at 532–33; *see also* Homes Ins. Co. v. Neilsen, 332 N.E.2d 240, 244 (Ind. Ct. App. 1975).

128. *See* Kessler, *supra* note 73, at 630 n.3. The true intent of the parties is best ascertained through a plain reading of the written contract. *See* Mid-Continent Cas. Co. v. Swift Energy Co., 206 F.3d 487, 491 (5th Cir. 2000).

129. Kessler, *supra* note 73, at 630–31 (noting that courts will often avoid incorporating public policy concerns into their interpretations of contract terminology because of the importance in protecting the right of parties to freely contract as they see fit).

130. *See* Mendoza v. Rivera-Chavez, 999 P.2d 29, 30–31 (Wash. 2000).

131. Prudential Prop. & Cas. Ins. Co. v. Jefferson, 185 F. Supp. 2d 495, 498 (W.D. Pa. 2002) (applying Pennsylvania law and holding that household exclusion clauses, which are designed to prevent family members who reside with the insured driver from collecting on an insurance claim, are not against public policy).

2. Rules Developed for Adhesion Contracts

Along with these universal contract principles, courts have established specific rules for insurance contracts, largely because of their adhesive nature.[132] Where some ambiguity exists within the contract, courts have been very accepting of parol evidence[133] to address this uncertainty.[134] However, if courts are unable to sift through the ambiguity, the contract will be interpreted in a manner that affords the greatest measure of protection to the insured.[135] The ambiguity principle is similar to the general contract rule of *contra proferentum*.[136] Nevertheless, the ambiguity principle systematically favors the insured when there is any doubt, while the traditional rule only applies as a tiebreaker.[137]

Over time, some courts have expanded the ambiguity principle into what is referred to as the "reasonable expectations" theory.[138] As originally formulated, the reasonable expectations doctrine stated, "[t]he objectively reasonable expectations of applicants . . . will be honored even though painstaking study of the policy provisions would have negated those expectations."[139] Though this doctrine originated as merely a description of how courts were deciding cases, by 1970, "reasonable expectations" became a rule of law in some states.[140]

Over the years, courts have shaped the reasonable expectations doctrine in many ways, creating different variations in different jurisdictions.[141] Currently, the most popular variation is that courts will only apply the doctrine after a finding of ambiguity within the policy.[142]

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132. *See* Farmers Auto. Ins. Ass'n v. St. Paul Mercury Ins. Co., 482 F.3d 976, 977–78 (7th Cir. 2007) (applying Illinois law). *But see* Fischer, *supra* note 84, at 1008–09 (questioning whether the fact that insurance contracts are adhesive has anything to do with why courts have devised unique rules for insurance policies).

133. Parol evidence is evidence of prior or contemporaneous oral or written agreements that modify the terms of a writing that the parties had intended to be a final and complete contract. *See* RESTATEMENT (SECOND) OF CONTRACTS § 213 (1981). This type of evidence is usually prohibited under the parol evidence rule. *See id.*

134. *See* Ins. Co. of N. Am. v. UNR Indus., No. 92 Civ. 4236, 1994 U.S. Dist. LEXIS 17295, at *1–2 (S.D.N.Y. Dec. 5, 1994) (permitting the inclusion of drafting materials and interpretive guidelines into evidence); Cole v. State Farm Mut. Ins. Co., 753 A.2d 533, 537 (Md. 2000) (allowing extrinsic evidence such as dictionaries).

135. Mark C. Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323, 327–28 (1986) (asserting that the reasoning behind the rule is that the insurer has complete control over the terms of the contract and, therefore, should be held solely responsible for any ambiguity).

136. *Contra proferentum* means that in cases of ambiguity, the contract shall be interpreted against the drafter. Fischer, *supra* note 84, at 1002.

137. Rahdert, *supra* note 135, at 328.

138. *See id.* at 325–26.

139. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provision*, 83 HARV. L. REV. 961, 967 (1970).

140. Susan M. Popik & Carol D. Quackenbos, *Reasonable Expectations After Thirty Years: A Failed Doctrine*, 5 CONN. INS. L.J. 425, 427 (1998).

141. *See* Randall, *supra* note 87, at 111–18 (noting that only Alaska and Hawaii still strictly adhere to the original doctrine formulation).

142. *See id.* at 114–18 (claiming that the application of the insured's reasonable expectations in this manner does not constitute an application of the original doctrine at all).

Although this version of the doctrine does incorporate some textual analysis, a court's reasoning varies greatly when applying any reasonable expectations doctrine as compared to a purely textual analysis.[143] Underlying policy considerations play a role when any variation of the reasonable expectations doctrine is applied.[144]

The basic purpose of the reasonable expectations doctrine is to protect the layman.[145] Consumers depend on insurance agents to sell them a policy that adequately serves their needs.[146] Purchasers of insurance are most often unable to relay to insurers every specific circumstance for which they seek coverage.[147] Instead, they rely on the insurance agent to use his judgment and knowledge of the product in fashioning a comprehensive insurance policy.[148] The reasonable expectations doctrine ensures that insurers do not take advantage of this situation and that insurance policies cover events that the insured wanted to be covered when the transaction took place.[149]

With this in mind, the extent to which the insured reads the contract is not the deciding factor for courts that apply the reasonable expectations doctrine.[150] Insurers know that policyholders will not read their contracts and, consequently, even clear language should not be enough to overrule consumer expectations.[151] However, the insurer may be able to avoid this issue if it brings the terms in question to the attention of the insured at the time of contracting.[152]

Another interpretive rule that favors insureds derives from the general contract theory that specific provisions control general ones when there is any perceived conflict between the two.[153] However, in insurance contracts, this rule is often applied only if the specific provision would

143. *Compare* Home Ins. Co. v. Neilsen, 332 N.E.2d 240, 244 (Ind. Ct. App. 1975) (finding that the exclusion clause is ambiguous and "intent" swallows "expected", yet still determining that an act of self-defense is an intended act by definition), *with* RAM Mut. Ins. Co. v. Meyer, 768 N.W.2d 399, 406 (Minn. Ct. App. 2009) (holding that an act must be "wrongful, willful, and egregious" to be excluded because such a definition of intent is more reasonable in light of the policy's overarching purpose). *But see* Popik & Quackenbos, *supra* note 140, at 429 (asserting that an ambiguity-based variation of the reasonable expectations doctrine is equivalent to the rule of *contra proferentem*).

144. *See, e.g.*, *RAM Mut. Ins. Co.*, 768 N.W.2d at 406.

145. *See* Keeton, *supra* note 139, at 967–68.

146. *See* Slawson, *supra* note 69, at 546–47 (analogizing the reasonable expectations doctrine to the implied warranty of fitness for intended purpose as applied to the sale of tangible goods).

147. *See id.*

148. *See id.*

149. *See, e.g.*, AMCO Ins. Co. v. Wehde, No. 05-0503, 2006 WL 650234, at *5 (Iowa Ct. App. Mar. 15, 2006).

150. *See* Keeton, *supra* note 139, at 967–68.

151. *Id.* at 968. This reasoning may even be implicitly applied to situations in which courts claim to come to a decision based on ambiguity within the contract. *See id.* at 972 (claiming that courts have "invented ambiguity" in insurance policies to reach a decision on reasonable expectations).

152. *Id.* at 968.

153. Fischer, *supra* note 84, at 1003.

expand the policy's coverage.[154] Furthermore, the policy will be construed broadly while exclusions will be construed narrowly.[155] In general, courts have exhibited a strong preference for protecting the insured whenever possible.[156]

D. The Role of Government in Insurance Interpretation

Perhaps unlike other adhesion contracts, the government has a strong interest in the insurance industry and its health.[157] Insurance plays an important socioeconomic role by managing the risks that come with every facet of life.[158] By managing these risks, the insurance industry lightens the government's burden of assisting individuals who suffer tremendous financial losses because of unforeseeable accidents.[159] In fact, one could even argue that modern society could not function without insurance.[160]

As a result, state statutes and regulations heavily influence the form and substance of insurance contracts.[161] All states require insurers to file and obtain approval of their policy forms from the appropriate state governmental entity before being eligible to issue policies within that state.[162] Policy inspectors are instructed to disapprove contract forms that are ambiguous, misleading, unfair to the consumer, against public policy, or in opposition to traditional principles of contractual equity.[163] Nonetheless, courts have generally not deferred to the government's approval, nor even acknowledged in their holdings that this process exists.[164]

These statutes also provide for specific objective standards to which insurance policies must adhere.[165] Policies must be in plain language so that an ordinary consumer will not have trouble reading it.[166] The readability of a policy includes the style and font size along with the overall

154. *Id. But see* Samuels v. Blue Cross of Greater Phila., 592 A.2d 1310, 1315 (Pa. Super. Ct. 1991) (holding that a provision in a booklet provided to the insured that conflicted with the policy and would have expanded coverage was not controlling).

155. White v. W. Title Ins., 710 P.2d 309, 313 (Cal. 1985); Blaylock v. Am. Guar. Bank Liab. Ins. Co., 632 S.W.2d 719, 721 (Tex. 1982).

156. *See* Fischer, *supra* note 84, at 1008–30; Telford F. Hollman, *Insurance As a Contract of Adhesion*, 1978 INS. L.J. 274, 279.

157. *See* Jeffrey W. Stempel, *The Insurance Policy As Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489, 1495–1513, 1556–57 (2010).

158. *See id.* at 1497–1502.

159. *See id.* at 1556–57 (referring specifically to accidental death/injury insurance).

160. *Id.* at 1497–98 (noting that an individual must have the proper type of insurance for many common activities such as obtaining a mortgage or driving a car); *see also* Rahdert, *supra* note 135, at 377 (noting that the government has always monitored the insurance industry closely because of its importance to society).

161. Stempel, *supra* note 157, at 1496; *see also* 1 APPLEMAN, *supra* note 10, § 2.04.

162. Randall, *supra* note 87, at 127; *e.g.*, FLA. STAT. ANN. § 627.410 (West 2004); N.Y. INS. LAW § 2307(b) (McKinney 2009).

163. *See* Randall, *supra* note 87, at 140–41.

164. *See infra* Part II.B.4.

165. *See* Randall, *supra* note 87, at 127–29.

166. *See, e.g.*, FLA. STAT. ANN. § 627.4145 (specifying that the text of the policy must achieve a minimum score based on a test that accounts for the number of words and syllables present in the policy).

appearance of the document.[167] In addition, these statutes regulate the manner in which the insurer presents the policy to the insured.[168] When a policy falls short of any legislatively imposed standard, courts will enforce a statute's mandate on the insurer.[169]

E. Freedom of Contract and Self-Defense

Of course, when ruling on insurance cases, many courts do much more than simply interpret the text of the contract and follow statutes.[170] The question of whether acts of self-defense fall within the parameters of intentional injury exclusion clauses can be viewed as a question of public policy.[171] In fact, it would be fair to say that this determination largely comes down to a battle of two of the most important principles in all of law: self-defense and freedom of contract. This presents a difficult choice that has resulted in differing court opinions.[172]

This decision is complicated by the leeway given to the insured when the court is initially determining if the assertion of self-defense can continue to be put forth at trial.[173] Consequently, if the insured claims to have acted in self-defense, and the court determines that acts of self-defense are not excluded, the insurer must represent the insured throughout the length of the trial.[174] The insurer may end up representing a person who, in hindsight, it had no obligation to defend in the first place.[175] For these reasons, courts' decisions on this topic have tremendous importance.

The concept of self-defense is a familiar one from criminal law[176] that likely needs little explanation, but its importance should be emphasized. Self-defense is commonly defined as a privilege by which an actor is entitled to use reasonable force to defend himself against unprivileged, harmful, or offensive contact.[177] "Self-defense is a basic right, recognized

167. *See* OHIO REV. CODE ANN. § 3902.04(a)(2)–(3) (LexisNexis 2010); MONT. CODE ANN. § 33-15-337(4) to (5) (2009).

168. *See* ALA. CODE § 27-14-19(a) (LexisNexis 2009) (specifying that the policy must be mailed to the insured within a reasonable amount of time upon its issuance); GA. CODE ANN. § 33-24-14 (2009).

169. *See* Aetna Cas. & Sur. Co. v. McMichael, 906 P.2d 92, 104 (Colo. 1995); Matland v. United Servs. Auto. Ass'n, 417 A.2d 46, 51–52 (N.J. Super. Ct. Law Div. 1980).

170. *See infra* Part II.B.

171. *See infra* Part II.B.

172. *Compare* Home Ins. Co. v. Neilsen, 332 N.E.2d 240, 244 (Ind. Ct. App. 1975) (holding that an act of self-defense is excluded), *with* Stoebner v. S.D. Farm Bureau Mut. Ins. Co., 598 N.W.2d 557, 559–60 (S.D. 1999) (holding that an act of self-defense did not preclude coverage).

173. *See infra* notes 247–49. *But see* Deakyne v. Selective Ins. Co. of Am., 728 A.2d 569, 571 (Del. 1997) (explaining that the court first analyzes if there is credible evidence to support the insured's claim of self-defense when the insurer disputes his duty to defend).

174. *See supra* notes 40–44 and accompanying text.

175. *See supra* notes 40–44 and accompanying text.

176. The law of self-defense is the same in both civil and criminal trials aside from the reasonable doubt standard used in criminal trials. Smith v. Lauritzen, 356 F.2d 171, 176 (3d Cir. 1966) (applying Pennsylvania law); Gibbons v. Berlin, 162 S.W.3d 335, 340 (Tex. App. 2005).

177. RESTATEMENT (SECOND) OF TORTS § 63 (1965).

by many legal systems from ancient times to the present, and . . . is 'the central component' of the Second Amendment right."[178] In addition, it is universally accepted as a justification for certain types of crimes and torts.[179] In a civil suit, a person acting in self-defense will escape liability from damages that he caused.[180] An attempt to restrict the concept of self-defense could be seen as an attempt to strip citizens of an innate right.[181]

Freedom of contract is the idea that citizens "'shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.'"[182] Freedom of contract is the embodiment of three related liberties wrapped up into one: the freedom of choice, the freedom from governmental interference, and the right to have the government enforce private agreements.[183] However, the freedom of contract is not just a liberty based on theoretical beliefs about individual rights.[184] It is largely viewed as an integral factor in sustaining a functional free market system.[185] In a free market economy, markets function most efficiently when people are free to pursue their interests as they see fit.[186] To achieve this, individuals must be able to choose their contracting partners and the terms of their agreements.[187] As a result, "it is a matter of great public concern that freedom of contract be not lightly interfered with."[188]

II. THE STATE COURT SPLIT ON INTENTIONAL INJURY EXCLUSION CLAUSES AND SELF-DEFENSE

Intentional injury exclusion clauses are most commonly worded to exclude from coverage any injury or damage that was "intended or expected" from the insured's viewpoint.[189] This broad language has left it up to courts to interpret whether self-defense falls within the exclusion.[190]

178. McDonald v. City of Chi., 130 S. Ct. 3020, 3023 (2010) (quoting District of Columbia v. Heller, 554 U.S. 570, 599 (2008)).

179. *See* 6 AM. JUR. 2D *Assault and Battery* § 69 (2012).

180. Touchet v. Hampton, 950 So. 2d 895, 899 (La. Ct. App. 2007); Richardson v. McGriff, 762 A.2d 48, 56 (Md. 2000); Beville v. Mac K. Falls, Inc., 619 P.2d 958, 960 (Or. Ct. App. 1980).

181. *See* Scribner v. Beach, 4 Denio 448, 450 (N.Y. Sup. Ct. 1847) (describing self-defense as a "primary law of nature").

182. Kessler, *supra* note 73, at 631 (quoting Printing & Numerical Registering Co. v. Sampson, (1875) 19 L.R.Eq. 462 at 465 (Eng.)).

183. Randall, *supra* note 87, at 122–23.

184. Kessler, *supra* note 73, at 630.

185. *Id.*; *see also* Caroline R. Fredrickson, *Freedom of Contract and the Remedy of Forced Hiring: A Comparative Assessment of German and American Anti-Discrimination Law*, 4 J.L. & POL'Y 1, 4 (1995).

186. Fredrickson, *supra* note 185, at 4.

187. *See id.* at 4–5.

188. Steele v. Drummond, 275 U.S. 199, 205 (1927).

189. Farm Bureau Town & Country Ins. Co. of Mo. v. Turnbo, 740 S.W.2d 232, 236 (Mo. Ct. App. 1987) (noting that the exclusion did not apply to expected injuries prior to 1966); *e.g.*, ALLSTATE INS. CO., *supra* note 17, at 16.

190. *See* Home Ins. Co. v. Neilsen, 332 N.E.2d 240, 243–44 (Ind. Ct. App. 1975) (summarizing the varying interpretations of intentional injury exclusion clauses that other

When determining if acts of self-defense are covered under an insurance policy, courts will either make a determination of the parties' intent based solely on a textual interpretation of the contract, or they will also incorporate public policy considerations into their interpretations.[191] Part II of this Note analyzes the reasoning that courts and commentators have applied within both of these categories.

A. Textual Analysis

This section discusses how courts have interpreted the text of intentional injury exclusion clauses as well as the consequences that each interpretation has on individuals seeking coverage for acts of self-defense. The analysis will mirror the two steps that courts undergo when reaching a decision. This section begins with an inquiry into whether the term "expected" broadens the exclusion clause or if it is merely swallowed by the term "intended." Courts may determine this through their own reasoning,[192] or by finding the intentional injury exclusion clauses are ambiguous.[193] The final step is to establish a definition for "intended" and, if necessary, "expected" and apply them to the act of self-defense.[194] Although the answers for either of these steps are not necessarily perfect indications of how courts have ruled, the reasoning behind the answers establishes the foundation for both the insured's and insurer's arguments.

1. Intended Versus Expected

The question of whether the term "expected" broadens an intentional injury exclusion clause may be pivotal in determining if acts of self-defense fall within the exclusion. The broader the range of actions that fall within the exclusion clause, the less likely it is that a court will find that an act of self-defense is covered by the insurance policy.[195]

One way that courts decide if "intended" and "expected" are synonymous is by simply applying their own logic to the argument.[196] Some courts have held that the terms are synonymous because expectations are part of intentions.[197] After all, "one expects the consequences of what one

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courts have made). *But see* Schwarcz, *supra* note 96, at 1298–99 (noting that some insurance policies explicitly address self-defense claims).

191. *See* Peter Nash Swisher, *Judicial Rationales in Insurance Law: Dusting off the Formal for the Function*, 52 OHIO ST. L.J. 1037, 1038 (1991) (recognizing that courts will approach insurance contracts in either a legal formalist or functionalist manner).

192. *See* Atl. Mut. Ins. Co. v. Am. Acad. of Orthopaedic Surgeons, 734 N.E.2d 50, 57 (Ill. App. Ct. 2000).

193. *See, e.g.*, *Neilsen* 332 N.E.2d at 243–44.

194. *See, e.g.*, *id.*

195. *See* Henry A. Hentemann, *"Expected or Intended": What Does It Mean*, 46 INS. COUNS. J. 331, 332 (1979).

196. *See Am. Acad. of Orthopaedic Surgeons*, 734 N.E.2d at 57.

197. *See* State Farm Fire & Cas. Co. v. Muth, 207 N.W.2d 364, 366 (Neb. 1973); Erie Ins. Exch. v. Muff, 851 A.2d 919, 927–28 (Pa. Super. Ct. 2004) (holding that both terms connote an element of conscious awareness).

intends."[198] Therefore, for these courts, there is no reason to expand on the high degree of certainty that is associated with intent.[199] Other courts have held that adding in an element of foreseeability, which is usually associated with the term "expected," would unnecessarily complicate the analysis.[200] Taking foreseeability into account does not help the court to define the parties' aims in agreeing to the contract.[201]

On the other hand, courts that hold that these terms are not synonymous justify their holdings by referencing the history of the exclusion's language.[202] Before 1966, the term "expected" was not included in the exclusion clause.[203] Scholars who support the insurers' position feel that the only possible reason for this is that the term was added to broaden the exclusion and to presumably exclude damages that are reasonably foreseeable to the insured.[204] If it were not added to expand the exclusion, there would be no reason to have both "intended" and "expected" in the clause.[205] No matter what a court ultimately determines to be the specific definition of "expected," a lesser degree of proof is required to show expected injury than intended injury.[206]

2. Ambiguity

When courts are not applying their own theories to the textual interpretation of insurance contracts, they often apply the same rules of construction that they would apply to any other contract.[207] Perhaps the most basic rule of contract interpretation is not to rewrite a contract when its terms are unambiguous.[208] However, any ambiguous terminology is to

198. *Muth*, 207 N.W.2d at 366 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 799, 1175 (unabr. ed. 1968)); *see also* Farmers & Mechs. Mut. Ins. Co. of W. Va. v. Cook, 557 S.E.2d 801, 807 (W. Va. 2001) (holding that the exclusion provided that the act must be intentional and the damage must be expected, thereby clarifying the need to show subjective intent on the part of the insured).

199. *See Muth*, 207 N.W.2d at 366.

200. *See id.* (noting that such a rule is difficult to apply to case facts); United Servs. Auto. Ass'n v. Elitzky, 517 A.2d 982, 987 (Pa. Super. Ct. 1986).

201. *See Elitzky*, 517 A.2d at 987 (describing foreseeability as a technical legal concept).

202. *See, e.g.*, Farm Bureau Town & Country Ins. Co. of Mo. v. Turnbo, 740 S.W.2d 232, 236 (Mo. Ct. App. 1987).

203. *Id.*

204. *See* Hentemann, *supra* note 195, at 332. *But see* James A. Fischer, *The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of a Justification*, 30 SANTA CLARA L. REV. 95, 125–26 (1990) (noting that while this approach would make sense linguistically, allowing "intended" and "expected" to take on separate meanings would create unintended consequences that run counter to public policy, such as excluding negligent acts from policy coverage).

205. Atl. Mut. Ins. Co. v. Am. Acad. of Orthopaedic Surgeons, 734 N.E.2d 50, 57 (Ill. App. Ct. 2000); John Dwight Ingram, *The "Expected or Intended" Exclusion Clause in Liability Insurance Policies: What Should It Exclude?*, 13 WHITTIER L. REV. 713, 715 (1992) (acknowledging that this interpretation is consistent with the rule of contract that no word should be ignored if it can serve a reasonable purpose).

206. *See* Tri-S Corp. v. W. World Ins. Co. 135 P.3d 82, 103 n.8 (Haw. 2006); *Am. Acad. of Orthopaedic Surgeons*, 734 N.E.2d at 57; *Turnbo*, 740 S.W.2d at 236.

207. *See supra* Part I.C.1.

208. *See* Home Ins. Co. v. Neilsen, 332 N.E.2d 240, 244 (Ind. Ct. App. 1975).

be resolved against the contract drafter (the insurer).[209] Ultimately, a contract is unambiguous when it can be given a definite legal meaning or interpretation.[210] While this definition seems straightforward, determining what constitutes ambiguous terminology is a little more complex.

Generally, courts have viewed the question of contractual ambiguity using either a contextual plain meaning approach[211] or a reasonable person standard.[212] The method that courts choose largely determines whether the intentional injury exclusion clause is found to be ambiguous.[213] If there is ambiguity, the clause will be read in favor of the insured, making it more likely that acts of self-defense would be covered by the policy.[214]

a. Contextual Plain Meaning View

In those jurisdictions that choose to implement a plain meaning approach, courts only focus on the terms within the contract and, if necessary, the circumstances under which the contract was formed.[215] Vaguely defined terms, coupled with evidence that the parties had different understandings of the meaning of the terms, would constitute ambiguity.[216] Also, ambiguity can be found where the contents of different sections within the contract contradict one another.[217]

When interpreted in this manner, intentional injury exclusion clauses are usually viewed as unambiguous.[218] While courts may have differing opinions regarding the precise definitions of "intended" and "expected,"[219] these terms are far from obscure for the layman.[220] Furthermore, as the Supreme Court of Mississippi articulated in *United States Fidelity & Guaranty Co. v. Omnibank*,[221] the exclusion clause is perfectly consistent with the overarching premise that insurance policies are meant to cover

209. Stone Container Corp. v. Hartford Steam Boiler Inspection & Ins. Co., 165 F.3d 1157, 1161–62 (7th Cir. 1999) (applying Illinois law and noting that this rule has greater force in the insurance setting).

210. Lopez-Franco v. Hernandez, 351 S.W.3d 387, 394 (Tex. App. 2011).

211. *See, e.g.*, U.S. Fid. & Guar. Co. v. Omnibank, 812 So. 2d 196, 199–200 (Miss. 2002).

212. *See, e.g.*, *Neilsen*, 332 N.E.2d at 243–44.

213. *Compare* Transamerica Ins. Co. v. Thrift-Mart, Inc., 285 S.E.2d 566, 571 (Ga. Ct. App. 1981), *with* United Servs. Auto. Ass'n v. Elitzky, 517 A.2d 982, 986–89 (Pa. Super. Ct. 1986).

214. *See, e.g.*, State Farm Fire & Cas. Co. v. Poomaihealani, 667 F. Supp. 705, 709 (D. Haw. 1987) (applying Hawaii law); Bamert v. Johnson, 909 So. 2d 705, 709–10 (La. Ct. App. 2005). *But see Neilsen*, 332 N.E.2d at 243–44 (holding that self-defense was not covered by the policy even though the exclusion clause was read in favor of the insured).

215. *See Thrift-Mart*, 285 S.E.2d at 571–72; *Omnibank*, 812 So. 2d at 199–200.

216. *Thrift-Mart*, 285 S.E.2d at 571.

217. *See Omnibank*, 812 So. 2d at 199–200.

218. *See, e.g.*, *id. But see* N. Bank v. Cincinnati Ins. Cos., 125 F.3d 983, 986–87 (6th Cir. 1997) (applying Michigan law and holding that an insurance policy that lists a number of intentional torts as covered by the policy yet also incorporates an intentional injury exclusion clause is inherently ambiguous).

219. *See supra* Part II.A.1.

220. *See Thrift-Mart*, 285 S.E.2d at 571–72.

221. 812 So. 2d at 196.

"occurrences."[222] Occurrences are defined as accidents, and accidents produce unintended and unexpected results.[223] Therefore, expected or intended injury from the standpoint of the insured cannot be the result of an accident and is not covered by the terms of the policy.[224] In the end, a finding that the clause is unambiguous will usually favor the insurer as both the terms "intentional" and "expected" will be applied.[225]

b. Reasonable Interpretation View

In those jurisdictions that do not follow the plain meaning approach, courts make a determination of ambiguity by ascertaining if there is more than one reasonable interpretation of the language in question.[226] This threshold is easily satisfied with respect to intentional injury exclusion clauses, because courts around the country have reached many different holdings when interpreting the impact that this clause has on insurance coverage.[227] Once this threshold has been met, the court will interpret the clause in a way that is most favorable to the insured.[228] This may mean that the narrower standard of intent to injure must be shown to exclude the resulting injury from coverage.[229] Alternatively, the court may simply determine that imposing upon the insurer the duty to cover acts of self-defense is the most favorable reading of the exclusion clause.[230]

3. Definition of Intent

When a court finds that the insured's actions will be excluded only if they were intentional, the court's definition of intent almost always determines whether an act of self-defense is excluded.[231] While this definition varies between jurisdictions, seemingly all courts agree that the

222. *Id.* at 199–200.
223. *Id.*
224. *See id.* at 200.
225. *See Thrift-Mart*, 285 S.E.2d at 572 (holding that where there is no ambiguity, the only issue in the case is to apply the insured's actions to the plain meaning of the policy).
226. *See* George v. Auto. Club of S. Cal., 135 Cal. Rptr. 3d 480, 489 (Ct. App. 2011); Bamert v. Johnson, 909 So. 2d 705, 709–10 (La. Ct. App. 2005) (using the fact that the law is unsettled in relation to self-defense as an indication of ambiguity).
227. Home Ins. Co. v. Neilsen, 332 N.E.2d 240, 243–44 (Ind. Ct. App. 1975); United Servs. Auto. Ass'n v. Elitzky, 517 A.2d 982, 986–89 (Pa. Super. Ct. 1986) ("[A] term is ambiguous only 'if reasonably intelligent men on considering it in the context of the entire policy would honestly differ as to its meaning.'" (quoting Erie Ins. Exch. v. Transamerica Ins. Co., 507 A.2d 389, 392 (Pa. Super. Ct. 1986))).
228. *See Elitzky*, 517 A.2d at 987. *But see Neilsen*, 332 N.E.2d at 244 (interpreting the clause in a manner that is most favorable to the insured yet ruling against him).
229. *Neilsen*, 332 N.E.2d at 243–44.
230. *See* State Farm Fire & Cas. Co. v. Poomaihealani, 667 F. Supp. 705, 709 (D. Haw. 1987); *Bamert*, 909 So. 2d at 709–10.
231. *See, e.g.*, *Poomaihealani*, 667 F. Supp. at 709; *Bamert*, 909 So. 2d at 709–10. *But see* Farmers & Mechs. Mut. Ins. Co. of W. Va. v. Cook, 557 S.E.2d 801, 809 (W. Va. 2001) (construing the purpose of self-defense in such a way that there would be no intent to injure under any definition).

injury itself must be intended, not the act.[232] This protects the insured from being denied coverage when the harm caused was a complete accident.[233] This reasoning also protects the insured when the type or magnitude of injury that results is different from what was anticipated.[234]

Moreover, even the basic definition of intent as applied to exclusion clauses is designed to protect the insured.[235] "Absent exceptional circumstances that objectively establish the insured's intent to injure, [a court] will look to the insured's subjective intent to determine intent to injure."[236] While courts differ on what constitutes "exceptional circumstances," this quote accurately describes a court's baseline application of "intended" as it is used in the exclusion clause.[237]

a. Straightforward Approach

In some jurisdictions, applying subjective intent to an act of self-defense leads to the direct conclusion that such an act is intentional and, therefore, excluded from coverage.[238] For example, in *Home Insurance Co. v. Neilsen*,[239] the Court of Appeals of Indiana held that when the insured delivered a deliberate blow to his neighbor's face, the insured was not entitled to coverage even if he did not start the fight.[240] The court held that a claim of self-defense only goes towards motive or justification, which is not contemplated within the exclusion clause.[241]

Courts that follow this line of reasoning have held that a person acting in self-defense subjectively desires to inflict harm upon another individual.[242] Consequently, that person intended his actions and falls within the exclusion clause.[243] The overarching goal of protecting oneself is

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232. *See* West *ex rel.* West v. Watson, 799 So. 2d 1189, 1191 n.2 (La. Ct. App. 2001) (noting that the provision is an intentional injury exclusion, not an intentional act exclusion); *Elitzky*, 517 A.2d at 987.

233. *See* Hentemann, *supra* note 195, at 332 (using an example where an individual's decision to speed may be intentional, but even if she has a car accident and injures another person, she did not intend any harm).

234. *Elitzky*, 517 A.2d at 987; *see also* Berlekamp Plastics, Inc. v. Buckeye Union Ins. Co., 705 N.E.2d 696, 702 (Ohio Ct. App. 1997) (holding that the particular resulting injury must have been intended). *But see* Ga. Farm Bureau Mut. Ins. Co. v. Purvis, 444 S.E.2d 109, 110 (Ga. Ct. App. 1994) ("[S]uch an exclusion is applicable . . . even if the actual, resulting injury is different either in kind or magnitude from that intended or expected." (emphasis omitted) (quoting Stein v. Massachusetts Bay Ins. Co., 324 S.E.2d 510, 511 (Ga. Ct. App. 1984)).

235. Voorhees v. Preferred Mut. Ins. Co., 607 A.2d 1255, 1265 (N.J. 1992).

236. *Id.*

237. *See* Am. Family Ins. Co. v. Walser, 628 N.W.2d 605, 611–14 (Minn. 2001) (holding that "intent" includes actual intent to injure in addition to actions where harm is so substantially certain that such actions may be classified as intentional as a matter of law).

238. *See* Clemmons v. Am. States Ins. Co., 412 So. 2d 906, 909–10 (Fla. Dist. Ct. App. 1982); Home Ins. Co. v. Neilsen, 332 N.E.2d 240, 244 (Ind. Ct. App. 1975).

239. 332 N.E.2d at 240.

240. *Id.* at 244.

241. *See id.*

242. *See, e.g.*, *Clemmons*, 412 So. 2d at 909.

243. *See id.* at 909–10.

completely detached from the act and immediate result of injuring the initial aggressor.[244]

b. Nuanced Interpretation

Nevertheless, the definition of intent can become muddled when a few key issues are taken into account. Courts must decide to what extent they will entertain the assertion that the act of the insured was not conscious and, therefore, could not be intentional.[245] In terms of self-defense, the answer to this question is very important, as some courts have accepted the theory that self-defense can be a reflex.[246]

For instance, in *Vermont Mutual Insurance Co. v. Walukiewicz*,[247] the Supreme Court of Connecticut held that an insured that grabbed an individual and tossed him off a porch and down a flight of steps was allowed to present evidence that his actions were in self-defense.[248] Furthermore, the court indicated that if the insured could show that he acted in self-defense, he would be entitled to coverage under his insurance policy.[249] Courts that apply this reasoning hold that as long as the insured justifiably reacted within a short period of time, he cannot be charged with any intent as contemplated by the exclusion clause.[250]

Another interpretive issue courts face is whether a person acting in self-defense actually desires to injure the attacker. A number of courts have held that an individual in such a situation is not acting for the purpose of injuring anyone.[251] Rather, a person acting in self-defense is acting with the intent to protect himself.[252] The individual has been thrust into a situation he had no control over, and is merely attempting to avoid harm.[253]

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244. *See id.* (finding little difference between a person injuring another in self-defense and a robber who shot and attempted to kill his pursuers).

245. *Compare* Eubanks v. Nationwide Mut. Fire Ins. Co., 393 S.E.2d 452, 455 (Ga. Ct. App. 1990) (holding that the insured's insanity does not negate his intent as a matter of law), *with* Inzinna v. Walcott, 868 So. 2d 721, 726 (La. Ct. App. 2003) (allowing a determination of consciousness to be litigated).

246. *See* Vt. Mut. Ins. Co. v. Walukiewicz, 966 A.2d 672, 682 (Conn. 2009) (holding that acts of self-defense are "by their very nature instinctive, spontaneous and unplanned"); *Inzinna*, 868 So. 2d at 726 (recognizing that "the instinct of self-preservation is primordial"); W. Fire Ins. Co. v. Persons, 393 N.W.2d 234, 238 (Minn. Ct. App. 1986) (finding self-defense to be consistent with an accident as defined in the insurance policy). *But see* Nationwide Mut. Fire Ins. Co. v. Mitchell, 911 F. Supp. 230, 231, 234 (S.D. Miss. 1995) (holding that when the insured saw his mother being pushed and came to her defense, he was not acting under an involuntary impulse).

247. 966 A.2d at 672.

248. *Id.* at 674, 683–84.

249. *See id.* at 682–83.

250. *See id.*; *Inzinna*, 868 So. 2d at 726. *But see* State Farm Fire & Cas. Co. v. Marshall, 554 So. 2d 504, 505 (Fla. 1989) (holding that because both assault and self-defense are often impulsive and reactive, and assault falls within the exclusion, so should self-defense).

251. Farmers & Mechs. Mut. Ins. Co. of W. Va. v. Cook, 557 S.E.2d 801, 809–10 (W. Va. 2001); *see also* Watkins v. S. Farm Bureau Cas. Ins. Co., 370 S.W.3d 848, 854 (Ark. 2009); *Walukiewicz*, 966 A.2d at 682; Allstate Ins. Co. v. Novak, 313 N.W.2d 636, 640–41 (Neb. 1981).

252. *Novak*, 313 N.W.2d at 640–41.

253. *See Walukiewicz*, 966 A.2d at 682.

As a result, these courts focus on the insured's principal intent of protecting himself.[254] This approach would force insurers to cover acts of self-defense in spite of an intentional injury exclusion clause.[255]

The Supreme Court of Nebraska illustrated this approach in *Allstate Insurance Co. v. Novak*.[256] In *Novak*, the insured struck a neighbor's friend with his fist, or possibly a beer bottle, causing injury.[257] However, the insured claimed that he only did so because the victim urinated in his yard, hurled obscenities at him and his wife, and began to make sudden movements towards him.[258] The court determined that a reasonable jury could find that the insured acted in self-defense with the intent of preventing harm to himself and his wife.[259] Consequently, the insurer was ordered to represent him in the underlying lawsuit.[260]

4. Definition of Expected

While the definition of "intended" provides support for some arguments made by insureds acting in self-defense, the presence of the term "expected"[261] may serve to rebut these arguments.[262] The common definition of an expected consequence is one that is more likely to happen than not.[263] However, many courts that have interpreted an intentional injury exclusion clause to include an insured's expectations have decided to apply a narrower definition.[264] With that said, courts that recognize the exclusion of expected injuries agree that a lesser degree of proof is needed to show expectation as opposed to intention.[265]

Applying this more relaxed standard to intentional injury exclusion clauses impacts how courts view self-defense in this context.[266] For

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254. *See id.*
255. *See, e.g.*, *id.*
256. 313 N.W.2d at 636.
257. *Id.* at 637.
258. *Id.*
259. *See id.* at 640–43.
260. *Id.* at 642.
261. Most, if not all, intentional injury exclusion clauses include the word "expected." *See supra* note 189 and accompanying text.
262. *See* Century Mut. Ins. Co. v. Paddock, 425 N.W.2d 214, 217 (Mich. Ct. App. 1988) (holding that even if the insured acted in self-defense, the injuries that he caused were to be expected, and therefore, he is barred from coverage).
263. *See* Hentemann, *supra* note 195, at 331–32 (citing various dictionaries that define "expected" events as those which are probable to occur).
264. *See* Zelda, Inc. v. Northland Ins. Co., 66 Cal. Rptr. 2d 356, 361 (Ct. App. 1997) (requiring that the injury was planned or foreseen with some certainty by the insured to fall within the exclusion); Tri-S Corp. v. W. World Ins. Co., 135 P.3d 82, 103 n.8 (Haw. 2006) (holding that high probability is not enough for the lesser "expected" standard); Farm Bureau Town & Country Ins. Co. of Mo. v. Turnbo, 740 S.W.2d 232, 236 (Mo. Ct. App. 1987) (holding that the insured must be found to have realized or should have realized a strong probability of the consequences). *But see* Auto-Owners Ins. Co. v. Harrington, 565 N.W.2d 839, 842 (Mich. 1997) (holding that the exclusion clause covered injuries that the insured was aware were likely to follow from his conduct).
265. *See Tri-S Corp.* 135 P.3d at 103 n.8; *Turnbo*, 740 S.W.2d at 236.
266. *See, e.g.*, *Paddock*, 425 N.W.2d at 217.

example, in *Century Mutual Insurance Co. v. Paddock*,[267] the insureds were involved in a bar fight that they claimed to have fought in self-defense.[268] As a result of the fight, the insureds allegedly caused the other parties to sustain a broken leg, a fractured eye socket, and a fractured ankle.[269] Despite their claim of self-defense, the Court of Appeals of Michigan held that because the injuries were "'natural, anticipated and expected result[s]'"[270] of the insureds' intentional acts of fighting, they were barred from coverage.[271]

For those jurisdictions where expected injuries are excluded, whether the insured desired the results of his actions is irrelevant.[272] Similarly, the fact that the insured acted based on reflex is also inconsequential.[273] If the insured should have reasonably anticipated that his actions would cause injury, his actions fall within the exclusion clause.[274] Courts have applied this principle on motions of summary judgment involving shootings,[275] punches,[276] and kicks[277] that were made in self-defense. Courts at times also apply this same principle based on a theory that certain actions are intentional as a matter of law.[278]

B. Public Policy Concerns

A court may decide to include public policy reasoning alongside, or in lieu of, its textual analysis. This section analyzes how courts and commentators have contemplated the importance of self-defense and freedom of contract, the pragmatic effects of adhesive insurance policies, and the role of state legislatures when resolving the self-defense coverage issue.[279]

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267. 425 N.W.2d at 214.
268. *Id.* at 215–16.
269. *Id.* at 215.
270. *Id.* at 217 (quoting Transamerica Ins. Co. v. Anderson, 407 N.W.2d 27, 28 (Mich. Ct. App.1987)).
271. *Id.*
272. *See* Auto-Owners Ins. Co. v. Harrington, 565 N.W.2d 839, 842–43 (Mich. 1997).
273. *See id.* at 842.
274. *See id.* (holding that the word "expected" broadened the scope of the exclusion to "'natural, foreseeable, expected, and anticipated result of an intentional act'" (quoting Allstate Ins. Co. v. Freeman, 443 N.W.2d 734, 743 (Mich. 1989))).
275. *Id.*; *see also* AMCO Ins. Co. v. Wehde, No. 05-0503, 2006 WL 650234, at *5 (Iowa Ct. App. Mar. 15, 2006).
276. *See* Richardson v. Ga. Farm Bureau Mut. Ins. Co., 678 S.E.2d 348, 349 (Ga. Ct. App. 2009).
277. *See* Century Mut. Ins. Co. v. Paddock, 425 N.W.2d 214, 217 (Mich. Ct. App. 1988).
278. *See* Home Ins. Co. v. Neilsen, 332 N.E.2d 240, 244 (Ind. Ct. App. 1975) (finding a punch to the face to be intentional as a matter of law). *But see* Inzinna v. Walcott, 868 So.2d 721, 726 (La. Ct. App. 2003) ("A punch in and of itself is not conclusive evidence that an intentional acts exclusion applies.").
279. Much of this section focuses on the arguments presented by scholars because courts often fail to explicitly describe how public policy concerns factored into their holdings in detail. *See* Keeton, *supra* note 139, at 968.

1. Protecting the Right to Self-Defense

Perhaps the most obvious policy concern that courts address in this context stems from the idea that self-defense should never be discouraged.[280] Self-defense constitutes a basic right and it has been argued that this right needs to be protected in all contexts.[281] Proponents of such arguments contend that a person acting in self-defense should not be liable for damages caused.[282] To protect this traditional notion, courts have often held that intentional injury exclusion clauses only exclude those acts that are inherently wrongful.[283]

For example, in *Deakyne v. Selective Insurance Co. of America*,[284] the Superior Court of Delaware held that the exclusion only applies to tortious conduct as defined under state law.[285] The court asserted that the exclusion clause was specifically designed to only apply to tortious conduct without explaining why this was so.[286] When applied to acts of self-defense, this test led the court to a straightforward conclusion.[287] Self-defense does not constitute a tortious act, because the insured "has not illegally infringed on the rights of another."[288] Consequently, the exclusion clause did not apply and the insured was covered under the policy.[289]

Critics of this line of reasoning are quick to point out that the judiciary should not make such decisions based on what it believes is a fair outcome.[290] They argue that public policy decisions are best left to the legislature.[291] These critics adhere to the notion that courts should act as a voice of the people only in extreme cases that garner virtual unanimity of

280. *See* Walters v. Am. Ins. Co., 8 Cal. Rptr. 665, 670 (Ct. App. 1960); Farmers & Mechs. Mut. Ins. Co. of W. Va. v. Cook, 557 S.E.2d 801, 809 (W. Va. 2001).

281. *See* McDonald v. City of Chi., 130 S. Ct. 3020, 3023 (2010).

282. *See* Touchet v. Hampton, 950 So. 2d 895, 899 (La. Ct. App. 2007); Richardson v. McGriff, 762 A.2d 48, 56 (Md. 2000); Beville v. Mac K. Falls, Inc., 619 P.2d 958, 960 (Or. Ct. App. 1980).

283. *See* Unified W. Grocers, Inc. v. Twin City Fire Ins. Co., 457 F.3d 1106, 1112 (9th Cir. 2006) (applying California law and construing the clause to only exclude acts that are "clearly wrongful and necessarily harmful" (quoting Mez Indus. v. Pac. Nat'l Ins. Co., 90 Cal. Rptr. 2d 721, 736 (Ct. App. 1999)); Deakyne v. Selective Ins. Co. of Am., 728 A.2d 569, 572 (Del. 1997) ("[C]lause is designed to prevent persons from insuring themselves against their own intentionally tortious conduct."); W. Fire Ins. Co. v. Persons, 393 N.W.2d 234, 237 (Minn. Ct. App. 1986) (holding that the clause prevents the insured from committing "wanton and malicious acts"); *Cook*, 557 S.E.2d at 809 (holding that the insured must act in a way that the law forbids). Statutory exclusions may be construed in the same way. *See* Tibert v. Nodak Mut. Ins. Co., 816 N.W.2d 31, 36–38 (N.D. 2012).

284. 728 A.2d at 569.

285. *Id.* at 572–73 (noting that courts have often referred to the clause as the "intentional tort exclusion").

286. *Id.*

287. *Id.* at 574.

288. *See id.*

289. *See id.*

290. *See* Slayko v. Sec. Mut. Ins. Co., 774 N.E.2d 208, 211–12 (N.Y. 2002); Popik & Quackenbos, *supra* note 140, at 434–35. *But see* Slawson, *supra* note 69, at 534–35 (arguing that society expects judges to abide by a general standard of fairness and that judicial policymaking is important to better serve the needs of citizens).

291. *See Slayko*, 774 N.E.2d at 211–12.

opinion.[292] Furthermore, scholars favoring insurers argue that the insurance industry should not be burdened with the financial costs that arise with attempting to preserve the right to self-defense on a case-by-case basis.[293] Ultimately, they believe that such a complex wealth transfer that affects an entire industry should be left in the hands of elected policymakers.[294]

In addition, some courts that have ruled in favor of insurers have held that although self-defense is important, it must be excluded for pragmatic reasons.[295] An insurer is obligated to defend the insured where the underlying complaint creates the reasonable possibility that the insured's actions will be covered.[296] Avoiding its obligation to defend the insured is very difficult,[297] and the insurer must continue to defend until all theories of recovery are exhausted.[298] Given the difficulty that often comes with determining who started a fight,[299] all parties are likely to claim self-defense.[300] In the end, some courts and scholars have asserted that insurance companies would litigate more cases, their costs would increase, and these costs would inevitably be passed on to consumers in the wasteful form of increased premiums.[301]

2. Maintaining the Freedom of Contract

Furthermore, the court highlighted in *Neilsen* that by focusing on the need to protect acts of self-defense, one can lose sight of the importance of the right to freely contract.[302] One of the basic principles of contract law is that the best way to interpret the intent of the parties is by reading the terms of the contract.[303] A bad bargain does not get a party out of the contract that he agreed to.[304] Moreover, the public's confidence that the courts will adhere to these principles is essential for a free market system to function.[305] For example, the *Neilsen* court stressed that the freedom of contract is an important public policy in its own right and it should not be forgotten within the context of insurance contracts.[306]

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292. *See supra* note 131 and accompanying text.
293. *See* Popik & Quackenbos, *supra* note 140, at 436–47.
294. *Id.*
295. *See* Hartford Fire Ins. Co. v. Superior Court, 191 Cal. Rptr. 37, 44 (Ct. App. 1983); Century Mut. Ins. Co. v. Paddock, 425 N.W.2d 214, 217 (Mich. Ct. App. 1988).
296. *See supra* notes 42–44 and accompanying text.
297. *See supra* notes 42–44 and accompanying text.
298. *See supra* note 44 and accompanying text.
299. *See, e.g.*, *Paddock*, 425 N.W.2d at 217.
300. *Id.* (noting that such a rule "would encourage barroom brawlers everywhere to cry 'He hit me first!' and run for insurance cover to defray the expenses of their actions").
301. *See id.*; *see also* Hartford Fire Ins. Co. v. Superior Court, 191 Cal. Rptr. 37, 44 (Ct. App. 1983); Popik & Quackenbos, *supra* note 140, at 432.
302. *See* Home Ins. Co. v. Neilsen, 332 N.E.2d 240, 244 (Ind. Ct. App. 1975) (acknowledging that the public may want to have insurance cover their acts of self-defense, but the parties in the case at hand did not bargain for such coverage by the terms of the contract).
303. Fischer, *supra* note 84, at 1009.
304. *Id.*
305. Kessler, *supra* note 73, at 630–31.
306. *See Nielsen*, 332 N.E.2d at 244.

On the contrary, those that support the insured's view find that the principle of freedom of contract has its flaws in the context of intentional injury exclusion clauses.[307] If the concept of foreseeability is incorporated into the exclusion clause, almost any act can be viewed as intentional or expected.[308] Then, the decision depends on how far a judge will stretch the concept of foreseeability.[309] According to this line of reasoning, strict adherence to the contract would defeat the purpose of insurance, and any interpretation would just be guesswork.[310]

Others believe that contractual freedom no longer exists in the insurance industry.[311] State insurance codes are extensive and they control insurance policies to a point that severely limits freedom of contract for both parties.[312] As such, some feel that it would be foolish for courts to attempt to interpret the will of the parties because their will is not expressed in the contract.[313] Those that adhere to this thought process believe that judges should interpret insurance policies in a way that recognizes the important public policies that justified the insurance regulations in the first place.[314]

3. Classifying Modern Insurance Contracts As Adhesive

A contract that is believed to be adhesive is often scrutinized more harshly than other contracts.[315] Consequently, classifying an insurance policy as adhesive can have a major impact on how exclusion clauses are interpreted. This section summarizes the opposing views on whether insurance policies are, in fact, adhesive.

a. The Classical View of Insurance Policies

Some scholars feel that exclusion clauses cannot be interpreted on text alone because insurance policies are standardized contracts of adhesion.[316] As such, they create a lack of choice for the consumer, and make it very difficult for the insured to understand the terms of the agreement.[317] Moreover, consumers often struggle to uncover any policy coverage details before actually purchasing insurance.[318] In the end, those who support this view believe that textual interpretation is often fruitless and policy

307. *See, e.g.*, Randall, *supra* note 87, at 107–09, 126–35.
308. Schwarcz, *supra* note 96, at 1298; *see also* Hentemann, *supra* note 195, at 332 (acknowledging the scope of coverage issue that foreseeability causes).
309. *See* Schwarcz, *supra* note 96, at 1298.
310. *See id.*
311. *See* State Farm Fire & Cas. v. Elsenbach, No. CV 09-00541, 2011 WL 2606005, at *7 (D. Haw. June 30, 2011); Rahdert, *supra* note 135, at 368; Randall, *supra* note 87, at 107–09, 126–35.
312. *See* Randall, *supra* note 87, at 126–35.
313. *See id.* at 108.
314. *See id.* at 108–09.
315. *See supra* Part I.C.2.
316. *See supra* Part I.B.2.
317. Schwarcz, *supra* note 96, at 1325–27; Slawson, *supra* note 69, at 529.
318. *See supra* notes 96–102 and accompanying text.

considerations, such as protecting acts of self-defense, should heavily influence a court's decision.[319]

According to this line of reasoning, traditional contractual interpretation is useless because insurance policies are not contracts in the traditional sense of the word.[320] As a result, an argument can be made that the plain text of a clause should only be controlling where there is an expression of joint consent in its inclusion in the contract.[321] However, based on the circumstances of how insurance policies are purchased, joint consent does not exist for any portion of the contract.[322] Consequently, the terms of the transactions must be judged on other standards as the courts see fit.[323]

b. Modern Flavor View

While it may be difficult for consumers to obtain insurance policy information, this does not mean that knowledgeable buyers cannot shop around and possibly bargain for certain terms.[324] This may hold especially true in light of the changes that the insurance industry continues to go through. Currently, the insurance industry is extremely competitive, and it has suffered like the rest of the economy due to the recent financial recession.[325] This has led insurers to seek new ways to generate revenue, one of which is through innovative products that can help conform coverage to the consumer's individual needs.[326]

In addition, some have asserted that the idea that all modern insurance contracts are completely standardized is a myth.[327] This is true even with respect to self-defense, where some policies expressly include self-defense within their coverage.[328]

In fact, insurance covering self-defense has gained some national attention in light of the highly publicized Florida "stand your ground" case

319. *See* Schwarcz, *supra* note 96, at 1343–45; Slawson, *supra* note 69, at 565–66.

320. *See* Slawson, *supra* note 69, at 544.

321. *See id.* at 541–42.

322. *See* Rahdert, *supra* note 135, at 337 & n.44.

323. *See* Slawson, *supra* note 69, at 550.

324. *See* Fischer, *supra* note 84, at 1017–19 (claiming that the issue created by insurance contracts is one of unequal knowledge, not bargaining power).

325. *See* DELOITTE, 2012 GLOBAL INSURANCE OUTLOOK 2–3 (2012), *available at* http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/FSI/US_FSI_Global%20Insurance%20Outlook%202012_011312.pdf; KPMG, INSURANCE INDUSTRY OUTLOOK SURVEY 5–8 (2012), *available at* http://www.kpmg.com/US/en/IssuesAndInsights/ArticlesPublications/Documents/2012-insurance-outlook-survey.pdf.

326. *See* DELOITTE, *supra* note 325, at 12–16; KPMG, *supra* note 325, at 9.

327. Schwarcz, *supra* note 96, at 1274–75, 1308 ("[S]ome companies have particularized language in their policies that deviates from the industry norm.").

328. Cochran v. Aetna Cas. & Sur. Co., 637 A.2d 509, 511 (Md. Ct. Spec. App. 1994) (reading the policy to state "Aetna will pay for bodily injury even though it may have been intended or expected from the standpoint of the insured if it results from the use of reasonable force to protect persons or property" (internal quotation marks omitted)); *see also* Schwarcz, *supra* note 96, at 1299.

involving the death of teenager Trayvon Martin.[329] Specifically, the National Rifle Association's endorsement of "stand your ground" insurance became a publicized topic of conversation in the national media.[330] This type of attention may have alerted consumers as to the possibility that special coverage would be needed for acts of self-defense.[331]

In considering these factors, supporters of the insurer's position argue that courts have put too much emphasis on labeling the insurance policies as contracts of adhesion.[332] Courts will often not even take into account evidence that the insured was capable of bargaining.[333] This is done in spite of the fact that the last systematic attempt to closely examine the content of different insurance policies took place in 1937.[334] Critics argue that this labeling is largely responsible for the insurance industry's undue financial losses as a result of heightened duties to defend.[335]

4. Legislative Considerations

Of course, insurance contracts also differ from typical adhesion contracts because they are highly regulated.[336] Every state requires regulatory review and approval of insurance policies prior to their sale.[337] The approval of policies is controlled by both extensive insurance code requirements and the judgment of the regulatory entity.[338] This means that state governments routinely approve insurance policies that do not specifically provide coverage for acts of self-defense.[339] However, courts usually do not acknowledge that the insurance contract was approved by a governmental entity when interpreting the contract's terms.[340] The few courts that have done so have differed in their determinations of how much they are bound

329. *Apply for Self-Defense Coverage*, NRA ENDORSED PROP. & CASUALTY INS. PROGRAM, https://nrains.locktonaffinity.com/Coverage.aspx?pID=2697 (last visited Sept. 20, 2013).

330. *See* Ali Gharib, *NRA Offers 'Stand Your Ground' Insurance To Cover Legal Costs of Shooting People in Self-Defense*, THINK PROGRESS (June 13, 2012, 11:20 AM), http://thinkprogress.org/justice/2012/06/13/497635/nra-stand-your-ground-insurance/.

331. *See New Concealed Carry Self-Defense Insurance Covers Attorney Fees*, PRWEB (Feb. 9, 2012), http://www.prweb.com/releases/201212/prweb9175741.htm (explaining that the U.S. Concealed Carry Association developed its self-defense program in response to large attorney's fee payments incurred by legally armed individuals who acted in self-defense).

332. *See, e.g.*, Fischer, *supra* note 84, at 1008–17 ("Decision-making by labeling is a dangerous and uninformed method unless the reasons that lead to the affixing of the label are explored and justified.").

333. *Id.* at 1013–14.

334. Schwarcz, *supra* note 96, at 1274–75.

335. *See* Fischer, *supra* note 84, at 1023.

336. *See supra* Part I.D.

337. *See supra* notes 161–64 and accompanying text.

338. Randall, *supra* note 87, at 126.

339. *See id.* at 135.

340. *Id.*

by regulatory approval.[341] This has led to some criticism of the judiciary's approach.[342]

a. Leave It to the Legislature

Critics have accused courts that use public policy considerations in their decisionmaking as taking on a role that is best left to the legislature.[343] State public policy decisions are usually left to the legislature, and some scholars argue that the courts should not determine what is fair in a contract without clear state legislative or administrative guidelines.[344] This is especially relevant in the insurance industry, which is so heavily regulated.[345]

Critics assert that courts are not designed to make these types of inquiries.[346] They believe that a court cannot make an informed public policy judgment based solely on the evidence offered by two parties.[347] Comprehensive evidence that accounts for broad factors, such as economic impact, is not likely to come up in a trial between two parties.[348] Lastly, scholars argue that judges themselves are not equipped to make well-informed decisions on many of these issues.[349] According to this line of reasoning, public policy issues, such as insuring self-defense, should be left to the legislature.[350]

b. A Role for Judges

In response, those in favor of judicial policymaking have pointed out the inadequacies of an administratively controlled system.[351] Perhaps the biggest issue is that administrative agencies are unable to keep up with the ever-changing insurance marketplace.[352] Agencies are often disorganized in their record keeping and, as a result, they are unable to understand the

341. *Id.* at 138–40 (noting that courts have held that insurance regulator approval is entitled to no deference, "some consideration," "great respect," "great weight," or "deference").

342. *See infra* Part II.B.4.a.

343. *See* Popik & Quackenbos, *supra* note 140, at 433 ("One of the chief vices of the reasonable expectations doctrine is that it turns every court into a mini-legislature."); Squires, *supra* note 103, at 255–56.

344. Swisher, *supra* note 191, at 1062–63.

345. *See* Randall, *supra* note 87, at 141 (noting that some statutes explicitly provide that the insurance regulator is to make all public policy determinations).

346. *See* Squires, *supra* note 103, at 255–56.

347. *See id.*

348. *See id.* at 255.

349. *See id.* at 256.

350. *See* Swisher, *supra* note 191, at 1062–63.

351. *See* Rahdert, *supra* note 135, at 341–42; Schwarcz, *supra* note 96, at 1266–67.

352. Schwarcz, *supra* note 96, at 1266–67.

changes that insurers are implementing in their policies.[353] This has led to an inability to "combat[] insurer fine print."[354]

Not only does this lack of organization prevent regulators from making informed policy decisions, but it also prevents them from helping consumers understand their policies.[355] Logically, uninformed consumers are more likely to make an ill-advised bargain that, if informed, they may not have wanted.[356]

Finally, supporters of the insureds' position have argued that the political process that comes with the current system also stifles consumer-oriented reform.[357] The insurance industry often lobbies legislatures for looser guidelines[358] because the industry finds governmental regulation as one of its greatest barriers to growth.[359] This could potentially hurt the insureds' representation in the political arena.[360] Ultimately, some scholars feel that there is still a need for judges to account for the interests of society when deciding insurance contract cases.

III. INSURERS SHOULD NOT BE FORCED TO FACE THE RISK OF SELF-DEFENSE CLAIMS

As can been seen from the arguments on both sides, the question of whether an act of self-defense falls within an intentional injury exclusion clause has no clear "right" answer. However, this Note contends that the best solution for the parties, courts, and society is for courts to exclude acts of self-defense when there is a standard intentional exclusion clause in the policy.[361] This section justifies this conclusion on a number of different fronts. From a purely textual standpoint, a plain reading is all that is needed to find that self-defense is excluded. Additionally, self-defense needs to be excluded from a pragmatic viewpoint based on the structure of the insurance industry and court procedures. Finally, the relatively modern changes that have shaped insurance contracts support this conclusion.

A. Text

The traditional sentiment within contract law has been that the best way to interpret the intent of the contracting parties is to look at the terms of the contract.[362] Intentional injury exclusion clauses usually prohibit injuries

353. *See id.* at 1267 (claiming that insurers secretly experiment with their own distinctive policy language).

354. Rahdert, *supra* note 135, at 341–42 (explaining that regulators have been more adept at limiting the effects of the most obviously abusive policy provisions).

355. *See* Schwarcz, *supra* note 96, at 1266–67.

356. *See id.*

357. *See* Rahdert, *supra* note 135, at 342.

358. *Id.*

359. KPMG, *supra* note 325, at 9.

360. *See* Rahdert, *supra* note 135, at 342.

361. The suggestion that acts of self-defense should be excluded is only directed at courts. This Note does not address the question of whether legislatures should make this same determination.

362. *See supra* notes 126–27, 182–89 and accompanying text.

that were "intended or expected" from the standpoint of the insured.[363] This language cannot be any clearer. First of all, the idea that the term "intended" would swallow "expected" is illogical. Each term has a distinct meaning,[364] and the use of "or" only serves to accentuate the difference. If this were not the case, why would insurers include both terms?[365] In response to judicial precedent in the field of insurance contracts, insurers included the term "expected," presumably to broaden the clause.[366] Distinguishing between the terms is the most logical conclusion.

Some courts have taken the approach that if the exclusion clause is found to be ambiguous, they will exclude only intended injuries.[367] This is in line with applying the reasonable interpretation that most favors the insured.[368] While this seems like a rational formula for interpreting an insurance contract, when a court looks for ambiguity based on considerations outside of the contract, this method loses its credibility.

Courts should determine ambiguity based on the structure of the contract, a plain reading of the terms, and the context in which the contract was formed.[369] Finding ambiguity on the basis that other courts have interpreted the clause differently[370] is circular reasoning. While different interpretations may provide evidence of ambiguity, different interpretations do not create ambiguity. A court should make its own judgment of ambiguity based on the terms of the contract,[371] not on what other courts, which may have taken nontextual considerations into account, may think.[372]

When ambiguity is determined properly, the intentional injury exclusion clause is unambiguous.[373] Virtually everybody buying insurance knows what "intended" and "expected" mean, and they know that there is a difference between them.[374] Also, the exclusion clause is consistent with the principle concept of insurance—that insurance is not designed to cover acts that the insured controls[375]—and the fact that policies are only meant to cover "occurrences."[376] This leads to the conclusion that the term "expected" broadens the exclusion clause to include likely or reasonably foreseeable events.

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363. *See supra* note 189 and accompanying text.

364. *Compare* Clemmons v. Am. States Ins. Co., 412 So. 2d 906, 908 (Fla. Dist. Ct. App. 1982) (defining intent such that a person must desire or want an event to occur), *with* Hentemann, *supra* note 195, at 331–32 (citing dictionaries which define "expected" as a synonym for probable).

365. *See supra* notes 202–06 and accompanying text.

366. *See supra* note 204 and accompanying text.

367. *See supra* note 229 and accompanying text.

368. *See supra* notes 135–37 and accompanying text.

369. *See supra* notes 215–18 and accompanying text.

370. *See supra* notes 226–29 and accompanying text.

371. *See supra* notes 215–18 and accompanying text.

372. *See* Keeton, *supra* note 139, at 969 (acknowledging that some courts have claimed to reach a holding on ambiguity principles when they were actually invoking public policy considerations).

373. *See supra* notes 218–26 and accompanying text.

374. *See supra* note 220 and accompanying text.

375. *See supra* notes 60–63 and accompanying text.

376. *See supra* notes 222–24 and accompanying text.

In turn, the textual arguments that have been made to exclude acts of self-defense from the definition of "intended" would have no merit when applied to the definition of "expected." The idea that individuals acting in self-defense are only intending to protect themselves rather than hurt anyone would not factor into the discussion. When a person acts in self-defense, there is little doubt that he believes he will probably injure his attacker, thereby making the injury expected.[377] Furthermore, even if self-defense is characterized as purely reactionary, spontaneous reactions still maintain an element of expectation.[378] Consequently, self-defense would preclude the insured from coverage under a purely textual analysis.

B. Pragmatic Reasons

Even if one were to disagree with this textual approach, the realities of the insurance industry, and how society is structured, lead to the same conclusion. Maintaining the health of the insurance industry is very important to all of society.[379] Often, insurers save their customers from financial ruin that could be caused by a number of unforeseeable disasters.[380] This saves the government from assisting many people who would otherwise be on the brink of financial collapse.[381] To perform this function efficiently, insurers must be able to accurately predict their risks.[382] Insurers account for risk through the receipt of premiums that are subsequently invested.[383] An inaccurate calculation of risks could lead to a shortage of funds and serious financial problems.[384] While a firm standard either way would help,[385] realistically speaking, only an explicit exclusion of acts of self-defense will allow insurers to make accurate predictions of risk.

This is true mainly because of the structure of litigation involving insurance companies. Insurers already have a very difficult time avoiding their duty to defend.[386] An insurer's duty to defend is usually determined based on a reading of the complaint against the insured, in conjunction with a reading of the insurance policy.[387] Courts can be very generous to the insured regarding this decision.[388] Furthermore, the insurer is not relieved of this duty until the possibility of recovery is completely eliminated.[389]

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377. *See supra* notes 266–78 and accompanying text.
378. *See supra* notes 273–75 and accompanying text.
379. *See supra* notes 158–60 and accompanying text.
380. *See supra* note 159 and accompanying text.
381. *See supra* note 159 and accompanying text.
382. *See supra* notes 107–09 and accompanying text.
383. *See* 1 COUCH ON INSURANCE, *supra* note 1, § 1.6; *see also supra* notes 14–15 and accompanying text.
384. *See supra* notes 107–09 and accompanying text.
385. *See* Popik & Quackenbos, *supra* note 140, at 431–32 (noting that without a firm standard, insureds would have a strong incentive to challenge any claim denial).
386. *See supra* notes 43–49 and accompanying text.
387. *See supra* notes 47–49 and accompanying text.
388. *See supra* notes 42–44 and accompanying text.
389. *See supra* note 44 and accompanying text.

This process will only tip even further against the insurer if self-defense does not fall within the exclusion clause. Self-defense is not an easy claim to prove, and more importantly, in this context, it is an extremely difficult claim to disprove.[390] There is nothing to stop the insured from asserting a self-defense justification for every physical incident that occurs.[391] Even if this is only one of the insured's theories, it would be enough to hold the insurer to its duty to defend.[392]

Ultimately, this extra litigation only serves to drive up insurers' expenses, and these costs are likely to be passed on to the consumers.[393] When statutory regulations exist that control insurance prices below market value,[394] insurers may be left with no ability to make a profit from liability insurance polices. In this sense, courts that have enforced coverage for self-defense have seemingly forgotten that the insurance industry is a private market that does not have bottomless pockets.

One could argue that while these pragmatic reasons show the need for a change in the system, they do not support the idea that self-defense should be entirely excluded. After all, self-defense is a basic right and an important principle in tort and criminal law.[395] Whether implicitly or explicitly, courts have been cognizant of this when determining the scope of coverage provided by an insurance policy.[396]

With this in mind, one can argue that the system used in some courts requiring the insured to show credible evidence of self-defense prior to the trial[397] would significantly reduce the litigation costs while preserving the right of self-defense. While this is partially true, the standard for such a determination is whether a reasonable jury could find that the insured was acting in self-defense.[398] Based on how courts have traditionally viewed an insurer's duty to defend,[399] this will likely not be a difficult threshold to overcome.

Furthermore, the underlying fear that the concept of self-defense will somehow be tainted is misguided. While self-defense is a justification, it does not give an individual additional rights that he was not entitled to in the first place.[400] An individual acting in self-defense will not have to pay for the damages that he caused, but that is all that self-defense provides—it cannot change a contract.[401]

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390. *See supra* notes 299–301 and accompanying text.
391. *See supra* note 300 and accompanying text.
392. *See supra* note 49 and accompanying text.
393. *See supra* note 301 and accompanying text.
394. *See* Randall, *supra* note 87, at 126 ("All states authorize rate regulation in some form, charging insurance commissioners with ensuring that insurance rates are not excessive, inadequate, or unfairly discriminatory.").
395. *See supra* notes 176–82 and accompanying text.
396. *See supra* Part II.B.
397. *See, e.g.*, Deakyne v. Selective Ins. Co. of Am., 728 A.2d 569, 571 (Del. Super. Ct. 1997).
398. *See id.*
399. *See supra* notes 41–43 and accompanying text.
400. *See supra* notes 176–81 and accompanying text.
401. *See supra* notes 176–81 and accompanying text.

C. Adhesion Myth

More importantly, there is no longer any substantive reason for courts to protect insureds from insurers. The outdated, universally accepted belief that insurance contracts are strictly adhesive and provide no choice for the consumers simply does not accurately apply to modern policies.[402] This is particularly true regarding acts of self-defense.[403] If an individual wants to pay the extra premium so that acts of self-defense are covered, he can find a policy that does just that.[404] Insurance companies are providing more choices for consumers, allowing them to customize their scope of coverage now more than ever.[405] Unfortunately, courts have grown so accustomed to characterizing insurance contracts as adhesive that they lose sight of the facts in front of them.[406] This misguided perception needs to change.

Nevertheless, there is no doubt that insurance policies still maintain some adhesive qualities in the form of standardized contracts.[407] Customers are often not able to dicker over specific terms within the contract.[408] This has led to the belief that there is a large disparity in bargaining power between the two parties.[409] However, the reality of the situation is that standardized contracts are absolutely necessary for the insurance industry to exist.[410] Risks can be covered with adequate funds only if they are homogenously characterized.[411] This cannot be accomplished if only a handful of people negotiate a self-defense exception into an otherwise standard intentional injury exclusion clause. Consequently, courts should not take a proinsured stance simply because "adhesion" has a negative connotation.

Of course, the aspect of the contracting process that most needs to be fixed is the customer's inability to read the terms of the policy prior to agreeing to them. Not only do consumers find it difficult to obtain an actual copy of the policy,[412] but they can also have trouble finding answers to specific questions they have.[413] Some insurers have taken it upon themselves to provide consumers with important detailed information on their websites.[414] However, the overall inability of insurers, insurance agents, and regulators to provide useful information to consumers leaves much to be desired. This deficiency needs to be remedied before one can say that the belief that insurance contracts are adhesive is a complete myth.

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402. *See supra* Part II.B.2.
403. *See supra* note 328 and accompanying text.
404. *See supra* note 328 and accompanying text.
405. *See supra* notes 324–27 and accompanying text.
406. *See* Fischer, *supra* note 84, at 1013–14 ("In some cases, the assumption is so strong as to allow for pro-insured rules of interpretation even though the portion of the insurance contract to be construed was drafted by the insured!").
407. *See supra* Part I.B.2.
408. *See supra* notes 316–24 and accompanying text.
409. *See supra* notes 87–89, 320–23 and accompanying text.
410. *See supra* Part I.B.3.
411. *See supra* note 108 and accompanying text.
412. *See supra* notes 96–102 and accompanying text.
413. *See supra* notes 97–100 and accompanying text.
414. *See supra* note 99 and accompanying text.

D. Deference to Legislatures

While courts like to decide these types of questions on their own, the truth is that the government has probably already answered the self-defense question for them. The government has a special interest in seeing that the insurance industry is run efficiently and provides adequate coverage to its customers.[415] Consequently, state legislatures have taken it upon themselves to heavily regulate the industry and scrutinize all insurance policies that are sold to the public.[416] In fact, insurance codes have been said to be so extensive that insurers are not freely contracting with the consumer.[417] The contract is essentially what the government says it is.[418]

Although this sentiment is not wholly accurate,[419] state governments have shown that they will control insurance policies and the industry where they see fit.[420] In light of this, the most logical approach to imposing terms in an insurance contract would be to leave this to the legislature. This is especially true for acts of self-defense as they pertain to intentional injury exclusion clauses. The self-defense issue has been arising in courts around the country since the 1970s.[421] If state legislatures wanted to make insurers provide coverage for self-defense in personal liability policies, they have had plenty of time to make their intent clear. If state governments have not acted, courts should approach the question from a purely textual perspective, not with public policy considerations in mind.[422]

Nevertheless, there have been criticisms that the regulators have not been able to adequately perform their responsibilities.[423] Even if this is the case, there is no reason to believe that judges are better positioned to be making these decisions. When a court expands the scope of insurance coverage, the insurance company is often ill prepared to handle that extra risk.[424] When premium payments were determined, this extra risk was not taken into account.[425] A decision that is so critical to the entire industry is best left to the legislature.[426] Judges are ill equipped to make a decision with such large ramifications based solely on the evidence of the two parties before the court.[427]

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415. *See supra* note 157 and accompanying text.
416. *See supra* notes 161–70 and accompanying text.
417. *See* Randall, *supra* note 87, at 126–35.
418. *See id.*
419. *See supra* Part III.C.
420. *See supra* notes 161–71 and accompanying text.
421. *See, e.g.*, Mullen v. Glens Falls Ins. Co., 140 Cal. Rptr. 605 (Ct. App. 1977); Homes Ins. Co. v. Neilsen, 332 N.E.2d 240 (Ind. Ct. App. 1975).
422. *See supra* notes 343–50 and accompanying text.
423. *See supra* notes 351–57 and accompanying text.
424. *See supra* note 109 and accompanying text.
425. *See supra* notes 107, 114 and accompanying text.
426. *See supra* notes 343–51 and accompanying text.
427. *See supra* notes 347–50 and accompanying text.

CONCLUSION

The issue of whether self-defense falls within intentional injury exclusion clauses is not new, but it is important to both insurers and insureds. Courts should decide that acts of self-defense are excluded from coverage in policies using the traditional exclusion clause. Whether based on text alone, or also considering public policy, this standard is the most logical and the most beneficial to all parties and to society as a whole.